P v. P

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN, DEANE, DAWSON,
TOOHEY, GAUDRON & McHUGH JJ.
[F.C. 94/019]
20 APRIL 1994

FAMILY LAW: Medical treatment to disabled child - Effect of treatment - Permanently infertile - Whether Family Court has powers to grant order - Whether contrary and in conflict with Guardianship Act - Whether Constitution overrides such conflict.

The applicant (Mrs. P) and the respondent (Mr. P) were married in 1966. In 1990, their marriage was dissolved by an order of the Family Court. L, who is at present 16 years old, is a child of that marriage. Pursuant to an order of the Family Court, Mrs. P has custody of L who is intellectually disabled, having, the mental ability of a child of between 3 and 7 years of age. L is a weekly boarder at a School in New South Wales for children with intellectual disabilities and otherwise resides with Mrs. P in that state.

Mrs. P applied to the Family Court for, *inter alia*, orders that L be sent for medical treatment after which L would cease to menstruate and will be permanently prevented from becoming pregnant. L is incapable of understanding the general nature and effect of such medical procedure.

Held:

[1] The Family Law Act can confer jurisdiction upon the Family Court to authorise such medical treatment in the case of a child who, like L, is resident in a state only to the extent that it is within the legislative competence of the Parliament to make a law conferring such jurisdiction.

[2] The authorisation of medical treatment of the kind involved in this case is something which is directly related to the protection and welfare of the particular child and which arises out of, and is itself an aspect of, the relevant marriage relationship. To the extent that the relevant provisions of Pt VII of the Family Law Act confer jurisdiction to give or withhold such authorisation, they are a law with respect to marriage within s. 51 (xxi). Moreover, the relevant provisions of Pt VII are, in the context of that conferral of jurisdiction upon the Family Court, directly concerned with parental rights and the custody and guardianship of infants in relation to divorce or matrimonial causes and are accordingly within the grant of legislative power contained in s. 51 (xxii).

[3] It follows that the general prohibition of "medical or dental treatment" of an incapable person imposed by s. 35(1) of the Guardianship Act is inconsistent with the provisions of Pt VII of the Family Law Act conferring welfare jurisdiction upon the Family Court to the extent that the general prohibition would preclude or render ineffective an order by the Family Court authorising such medical and dental treatment of an incapable child of a marriage aged 16 years or more. To the extent of that inconsistency, s. 35(1) of the Guardianship Act is rendered invalid by s. 109 of the Constitution. That does not, of course, mean that s. 35(1) is generally invalid in so far as it applies to children of a marriage. The invalidity under s. 109 is, like the inconsistency, confined to the purported operation of the State Act to prohibit treatment authorised by the Family Court in the exercise of the jurisdiction validly conferred upon it by the Family Law Act. As a practical matter, that invalidity will only be significant

in a case where the Family Court exercises its jurisdiction to authorise particular medical treatment and then only in respect of that treatment.

[4] If, in the exercise of its jurisdiction, the Family Court makes an order which is inconsistent with the *prima facie* operation of s. 35(1) of the Guardianship Act, it is not the Family Court's order which overrides s. 35(1)'s prohibition in such case, it is s. 109 of the Constitution. For the reasons which have been given, s. 35(1) of the Guardianship Act is, to the extent that it would prohibit and render criminal what a competent order of the Family Court would authorise, inconsistent with the provisions of the Family Law Act validly empowering the Family Court to make such an order. That being so, the effect of s. 109 of the Constitution is that s. 35(1) of the Guardianship Act is invalid to the extent of that inconsistency.

[By majority, questions raised by way of case stated answered in the positive].

Cases referred to:

Secretary, Department of Health and Community Services v. J.W.B. and S.M.B. (Marion's Case) [1992] 175 CLR 218 ***(foll)***
Re Jane [1988] 94 FLR 1 ***(refd)***
Re Eve [1986] 31 DLR ***(refd)***
In Re B. (A Minor) [1988] AC 199 ***(refd)***
Attorney-General (Vict.) v. The Commonwealth ("the Marriage Act Case") [1962] 107 CLR 529 ***(refd)***
Russell v. Russell [1976] 134 CLR 495 ***(refd)***
Re F.; Ex parte F. [1986] 161 CLR 376 ***(refd)***
Reg v. Lambert; Ex parte Plummer [1980] 146 CLR ***(refd)***
Gazzo v. Comptroller of Stamps (Vict.) [1981] 149 CLR 227 ***(refd)***
Fountain v. Alexander [1982] 150 CLR 615 ***(refd)***
In the Marriage of Cormick [1984] 156 CLR 170 ***(refd)***
Ex parte McLean [1930] 43 CLR 472 ***(refd)***
Ansett Transport Industries (Operations) Pty. Ltd v. Wardley [1980] 142 CLR 237 ***(refd)***
Colvin v. Bradley Brothers Pty. Ltd. [1943] 68 CLR 151 ***(refd)***
Victoria v. The Commonwealth ("the Kakariki") [1937] 58 CLR 618 ***(refd)***
Collins v. Charles Marshall Pty. Ltd. [1955] 92 CLR 529 ***(refd)***
T.A. Robinson & Sons Pty. Ltd. v. Haylor [1957] 97 CLR 177 ***(refd)***
Metal Trades Industry Association v. Amalgamated Metal Workers' and Shipwrights' Union [1983] 152 CLR 632 ***(refd)***
Airedale N.H.S. Trust v. Bland [1993] AC 789 ***(refd)***
Harris v. Caladine [1991] 172 CLR 84 ***(refd)***
Collins v. Wilcock [1984] 1 WLR 1172 ***(refd)***
Scott v. Scott [1930] 1 DLR 53 ***(refd)***
Dart v. Dart [1863] 3 Sw & Tr [164 ER 1254] ***(refd)***
Arg. R. v. Williams [1695] 13 St Tr 1369 ***(refd)***
R v. Philips [1757] 1 Burr 292 ***(refd)***
Cowley v. Cowley [1901] AC 450 ***(refd)***
United Engineering Workers' Union v. Devanayagam [1968] AC 356 ***(refd)***
In re R. (A Minor) (Wardship: Consent of Treatment) [1992] Fam 11 ***(refd)***
Re Eve [1986] 31 DLR (4th) 1 ***(refd)***
In re C. (Wardship: Treatment) (No. 2) [1986] 31 DLR (4th) at 14 ***(refd)***
A v. Liverpool City Council [1982] AC 363 ***(refd)***
*In re W. [1985] AC 791****(refd)***
In re Mohamed Arif (An Infant) [1968] Ch 643 ***(refd)***
In re J.S. (A Minor) [1990] Fam 182 ***(refd)***
In re R (Wardship: Criminal Proceedings) [1991] Fam 56 ***(refd)***

Attorney-General v. Birmingham, Tame, and Rea District Drainage Board [1912] AC 788 ***(refd)***
Giese v. Williston [1963] 37 DLR (2d) 447 ***(refd)***
Dao v. Australian Postal Commission [1987] 162 CLR 317 ***(not foll)***
Vitzdamm-Jones v. Vitzdamm-Jones [1981] 148 CLR 383 ***(refd)***
Fountain v. Alexander [1982] 150 CLR 615 ***(refd)***
V. v. V. [1985] 156 CLR 228 ***(refd)***
In the Marriage of Cormick [1984] 156 CLR 170 ***(refd)***
Reg v. Cook; Ex parte C. [1985] 156 CLR 249 ***(refd)***
Reg v. Lambert; Ex parte Plummer [1980] 146 CLR 447 ***(foll)***
Dougherty v. Dougherty [1987] 163 CLR 278 ***(refd)***
Re L.S.H.; Ex parte R.T.F. [1987] 164 CLR 91 ***(refd)***
Felton v. Mulligan [1971] 124 CLR 367 ***(refd)***
In re A.B. (An Infant) [1954] 2 QB 385 ***(refd)***
In re M. (An Infant) [1961] Ch 328 ***(refd)***
In re M. and H. (Minors) [1990] 1 AC 686 ***(refd)***
In re J.S. (A Minor) [1990] Fam 182 ***(refd)***
In re R. (Wardship: Criminal Proceedings) [1991] Fam 56 ***(refd)***
Attorney-General v. British Broadcasting Corporation [1981] AC 326 HL ***(refd)***
T.A. Robinson & Sons Pty. Ltd. v. Haylor [1957] 97 CLR 177 ***(refd)***
Stock Motor Ploughs Ltd. v. Forsyth [1932] 48 CLR 128 ***(refd)***
Victoria v. The Commonwealth [1937] 58 CLR ***(refd)***
Carter v. Egg and Egg Pulp Marketing Board (Vict.) [1942] 66 CLR 557 ***(refd)***
Reg. v. Winneke; Ex parte Gallagher [1982] 152 CLR 211 ***(refd)***
Colvin v. Bradley Brothers Pty. Ltd. [1943] 68 CLR 151 ***(refd)***

Legislation referred to:
Children (Care and Protection) Act 1987, s. 20B (NSW)
Commonwealth Powers (Family Law - Children) Act 1986, s. 3(1)(b) (NSW)
Conciliation and Arbitration Act, s. 65
Criminal Code Act 1983, ss. 26(1)(d), 187, 188 (NT)
Family Law Act 1975, ss. 60E(3), F(2)(a) (b), & H 63(1), 64(1)
Family Law Amendment Act 1983 & 1987 (Cth)
Guardianship Act 1987, ss. 33(1), 34(1)(c), 35(1), 45(2), 49(2) (NSW)
Guardianship (Amendment) Act 1993 (NSW)
Industrial Relations Act 1988, s. 152 (Cth)
Judiciary Act 1903, ss. 40(1), 79 (Cth)
Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW)

Other sources referred to:
Federal Jurisdiction in Australia, Cowen and Zines, 2nd Edn., (1978) at 224-228

For the applicant - Lesley Strong
For the respondent - In person
For the interveners - B.M. Selway, Crown Solicitor for the State of South Australia, H.K. Roberts, Crown Solicitor for the State of New South Wales

JUDGMENT

Manson CJ, Deane, Toohey and Gaudron JJ:

This is a case stated by the Chief Justice in proceedings instituted in the Family Court of Australia and removed into this Court by an order made pursuant to s. 40(1) of the Judiciary Act 1903 (Cth) on the application of the Attorney-General for New South Wales.

Facts

The applicant ("Mrs P") and the respondent ("Mr P") were married in 1966. In 1990, their marriage was dissolved by an order of the Family Court. L, who is at present 16 years old, is a child of that marriage. Pursuant to an order of the Family Court, Mrs P has custody of L who is intellectually disabled, having, so the Court was informed, the mental ability of a child of between 3 and 7 years of age. L is a weekly boarder at a school in New South Wales for children with intellectual disabilities and otherwise resides with the applicant in that state.

In June 1993, Mrs P applied to the Family Court for a number of orders including an order:

> That the applicant wife and respondent husband be directed to do all such acts and things and sign all and any documents/authorisations/consents necessary to cause the child (L) born 27 July 1977 to attend a medical practitioner to obtain medical treatment such that -
>
> (i) she thereafter ceases to menstruate; and
> (ii) she is permanently prevented from becoming pregnant.

As that proposed order indicates, Mr P was named as the respondent in the proceedings. Nonetheless, he strongly supports the application to the Family Court. He appeared in person before this Court on the hearing of the case stated and made clear that he, like Mrs P, is convinced that the proposed medical treatment is essential in the interests of L's welfare. The other orders sought by the applicant in the proceedings in the Family Court include an order that the "medical practitioner" be one "recommended/suggested" by a named member of the medical staff of the Prince of Wales Children's Hospital or, in the alternative, a medical practitioner appointed by the Family Court.

Subject to the making of such orders by the Family Court, the applicant and the respondent propose to have carried out on L "a medical treatment intended to have the effect of rendering her permanently infertile". L is incapable of understanding the general nature and effect of such a medical procedure. For reasons that will appear, neither the applicant nor the respondent has applied, or intends to apply, to the Guardianship Board constituted under the Guardianship Act 1987 (NSW) ("the Board") for its consent to the carrying out of the proposed medical treatment. The argument of the case has proceeded on the basis that the proposed medical treatment would be carried out in New South Wales.

Questions reserved

The case stated reserves five questions for the opinion of the Full Court. They are as follows:

1. Does the Family Law Act 1975 (C'th) purport to confer on the Family Court of Australia the power to make an order authorising a person to carry out on a child of a marriage medical treatment in New South Wales that is intended, or is reasonably likely, to have the effect of rendering the child permanently infertile, in circumstances where the carrying out of the treatment would otherwise be contrary to the Guardianship Act 1987 (NSW)?
2. If yes to 1, is such purported conferral of power on the Family Court of Australia consistent with Chapter III of the Commonwealth Constitution?
3. If yes to 2, is such purported conferral of power on the Family Court of Australia a valid exercise of the power of the Commonwealth Parliament?

4. If yes to 3, except in cases to which section 60H(2) (e) of the Family Law Act 1975 (C'th) applies, does that Act, by virtue of s. 109 of the Constitution, invalidate the Guardianship Act 1987 (NSW) to the extent that the latter act purports to prohibit or authorise a medical procedure to be carried out on a child of a marriage that is intended, or is reasonably likely, to have the effect of rendering the child permanently infertile?
5. If yes to 4, will orders by the Family Court as sought by the applicant in this case provide a valid authority to a medical practitioner in New South Wales to carry out the procedure referred to?

At the hearing of the stated case, both parties and the Commonwealth Attorney-General, who intervened in the proceedings, supported an affirmative answer to each of these questions. The argument in support of negative answers was fully presented on behalf of the Attorneys-General of New South Wales and South Australia who also intervened.

The Guardianship Act

All of the provisions of the Guardianship Act to which specific reference is made in the body of this judgement are in Pt 5 ("Medical And Dental Treatment") of that Act. Section 43(1) Provides that Pt 5 applies:

> to a patient:
>
> (a) who is of or above the age of 16 years; and
> (b) who is incapable of giving consent to the carrying out of medical or dental treatment.

It is common ground that L is such a "patient" and that Pt 5 is applicable to her. (until the amendments effected by the Guardianship (Amendment) Act 1993 (NSW) there was a definition in Pt 5 of the Act which reads:

> 'patient' means a person on whom some other person is proposing that medical or dental treatment be carried out).

The provisions of Pt 5 establish a legislative scheme regulating the administration of "medical or dental treatment" to the persons to whom the Part applies. For present purposes, the more important provisions of Pt 5 are as follows:

> 33. (1) In this Part:
>
> 'medical or dental treatment' or 'treatment' means:
>
> (a) medical treatment (including any medical or surgical procedure, operations or examination and any prophylactic, palliative or rehabilitative care) normally carried out by or under the supervision of a medical practitioner; or
>
> (b) dental treatment (including any dental procedure, operation or examination) normally carried out by or under the supervision of a dentist; or
>
> (c) any other act declared by the regulations to be treatment for the purposes of this Part,
>
> but does not include:
>
> (d) any non-intrusive examination made for diagnostic purposes (including a visual examination of the mouth, throat, nasal cavity, eyes or ears); or
>
> (e) first-aid medical or dental treatment; or
>
> (f) the administration of a pharmaceutical drug for the purpose, and in accordance with the dosage level, recommended in the manufacturer's instructions (being a

drug for which a prescription is not required and which is normally self-administered); or

(g) any other kind of treatment that is declared by the regulations not to be treatment for the purposes of this part;

'major treatment' means treatment (other than special treatment) that is declared by the regulations to be major treatment for the purposes of this Part;

'minor treatment' means treatment that is neither special treatment nor major treatment'

'special treatment' means:

(a) any treatment that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out; or
(b) any new treatment that has not yet gained the support of a substantial number of medical practitioners or dentists specialising in the area of practice concerned; or
(c) any other kind of treatment declared by the regulations to be special treatment for the purposes of this Part.

(2) For the purposes of this part, a person is incapable of giving consent to the carrying out of medical or dental treatment if the person:

(a) is incapable of understanding the general nature and effect of the proposed treatment; or
(b) is incapable of indicating whether, or not he or she consents or does not consent to the treatment being carried out.

...

35. (1) A person must not carry out medical or dental treatment on a patient to whom this Part applies unless:

(a) consent for the treatment has been given in accordance with this Part; or
(b) the carrying out of the treatment is authorised by this Part without any such consent; or
(c) the treatment is carried out in accordance with an order made by the Supreme Court in the exercise of its jurisdiction with respect to the guardianship of persons,

Maximum penalty:.

- in the case of special treatment (on conviction on indictment) - imprisonment for 7 years; or
- in the case of minor or major treatment (on summary conviction) - imprisonment for 1 year or 10 penalty units, or both.

(1A) Subsection (1) (c) does not apply in the case of special treatment that is special treatment of the kind referred to in paragraph (a) of the definition of ;special treatment' in s. 33(1) or special treatment prescribed by the regulations for the purposes of this subsection.

(2) This section does not limit the operation of any other act or law under which minor treatment may be carried out on a person without that person's consent.

36. (1) Consent to the carrying out of medical or dental treatment on a patient to whom this Part applies may be given:

(a) in the case of minor or major treatment - by the person responsible for the patient (section 3A(1) (in Pt 1) of the Guardianship Act defines "person responsible". The

combined effect of the definition and provisions of the Children (Care and Protection) Act 1987 (NSW) to which the definition refers is that "the person responsible" for an incapable child (i.e. a person under the age of 18 years) will ordinarily be the parents or a parent or other person who has the care of the child or, if the child is under the care of the Minister or Director-General for Youth and Community Services, the Minister or the Director-General); or

(b) in any case - by the Board.

(2) The guardian (section 3 of the Guardianship Act (in Pt 1) defines "guardian" for the purpose of that Act as meaning "a person who is, whether under this Act or any other Act or law, a guardian of the person of some other person (other than a child who is under the age of 16 years) of a patient may also consent to the carrying out of continuing or further special treatment if the Board has previously given consent to the carrying out of the treatment and has authorised the guardian to give consent to the continuation of that treatment or to further treatment of a similar nature.

37. (1) Medical or dental treatment may be carried out on a patient to whom this Part applies without consent given in accordance with this Part if the medical practitioner or dentist carrying out or supervising the treatment considers the treatment is necessary, as a matter of urgency:

(a) to save the patient's life; or
(b) to prevent serious damage to the patient's health; or
(c) except in the case of special treatment - to prevent the patient from suffering or continuing to suffer significant pain or distress.

(2) Minor treatment may (subject to subsection (3)) also be carried out on a patient to whom this Part applies without any consent given in accordance with this Part if:

(a) there is no person responsible for the patient; or
(b) there is such a person but that person either cannot be contracted or is unable or unwilling to make a decision concerning a request for that person's consent to the carrying out of the treatment.

...

42. (1) Any person may apply to the Board for consent to the carrying out of medical or dental treatment on patient to whom this Part applies.

...

44. (1) If, after conducting a hearing into an application for consent to the carrying out of medical or dental treatment on a patient to whom this Part applies, the Board is satisfied that it is appropriate for the treatment to be carried out, it may consent to the carrying out of the treatment.

...

45. (1) The Board must not give consent to the carrying our of medical or dental treatment on a patient to whom this Part applies unless the board is satisfied that the treatment is the most appropriate form of treatment for promoting and maintaining the patient's health and well-being.

(2) However, the Board must not give consent to the carrying out of special treatment unless it is satisfied that the treatment is necessary:

(a) to save the patient's life; or
(b) to prevent serious damage to the patient's health

or unless the Board is authorised to give that consent under subsection (3).

(3) In the case of:

(a) Special treatment of a kind specified in paragraph (b) of the definition of that expression in s. 33(1); or
(b) prescribed special treatment (other than special treatment of a kind specified in paragraph (a) of that definition),

the Board may give consent to the carrying out of the treatment if it is satisfied that:

(c) the treatment is the only or most appropriate way of treating the patient and is manifestly in the best interests of the patient; and
(d) in so far as the National Health and Medical Research Council has prescribed guidelines that are relevant to the carrying out of that treatment - those guidelines have been or will be complied with as regards the patient.

...

46. (1) Subject to subsections (2) and (3), a consent given under this Part in respect of the carrying out of medical or dental treatment on a patient to whom this Part applies has effect:

(a) as if the patient had been capable of giving consent to the carrying out of the treatment; and
(b) as if the treatment had been carried out with the patient's consent.

Three comments should be made at once about the overall effect of the provisions of Pt 5. The first is that, putting to one side the insignificant matters excluded from the definition of "medical or dental treatment" in s. 33(1) and treatment authorized by the Supreme Court of New South Wales, the Part establishes a comprehensive scheme governing the administration of medical or dental treatment to incapable persons who are of or above the age of 16 years. The basis of that scheme is s. 35(a)'s general prohibition, under criminal sanction, of the administration of such treatment to such persons unless either consent has been given in accordance with Pt 5 or the carrying out of the treatment without consent is authorized by that Part. In the case of "minor or major treatment" (i.e. treatment which is not "special treatment": see definition in s. 33(1)) consent may be given by "the person responsible for the patient" or by the Board. In the case of "special treatment", consent can, apart from urgent cases, be given only by the Board.

The second comment which should be made at this stage is that, under that scheme, particularly stringent restrictions are imposed in relation to treatment involving sterilization (paragraph (a) "special treatment"). In no case can such treatment be carried out otherwise than for the reason that it is necessary to save the patient's life or to prevent serious damage to the patient's health. The third comment is that the Guardianship Act expressly recognizes and, subject to one important qualification, preserves the jurisdiction of the Supreme Court of New South Wales to authorize medical or dental treatment in the exercise of its guardianship jurisdiction. It does this by s. 35(1)(c)'s exclusion of treatment carried out in accordance with an order made by the Supreme Court in the exercise of that jurisdiction from s. 35(1)'s otherwise general prohibition of treatment without direct authorization or consent under other provisions of Pt 5. The qualification is that s. 35(1)(c) does not apply in the case of treatment involving sterilization or in the case of other prescribed "special treatment".

The distinction which s. 45(2) of the Guardianship Act draws between "special treatment" which is "necessary" to save life or prevent serious damage to health and

other "special treatment" is, in the case of a medical procedure involving sterilization, imprecise and difficult to apply in a borderline case. Nonetheless, some such distinction has commonly been seen as of critical importance in cases dealing with the power of parents or the jurisdiction of Courts to authorize such a procedure in the case of an incapable child. A comparable but more precise (and more stringent) distinction was drawn by this Court in *Secretary, Department of Health and community Services v. J.W.B. and S.M.B (Marion's* case) ([1992] 175 CLR 218; see also *Re Jane* [1988] 94 FLR 1 at 30-31; *Re Eve* [1986] 31 DLR (4th) 1 at 9, 30-31 but cf. In *Re B. (A Minor)* [1988] AC 199 at 203-204 per Lord Halisham of St. Marylebone LC, who found the distinction between "therapeutic" and "non-therapeutic" sterilization "meaningless"; and at 205 per Lord Bridge of Harwich) where the majority judgement of Manson CJ, Dawson, Toohey and Gaurdron JJ. makes clear procedure involving sterilization "falls outside the ordinary scope of parental powers and therefore outside the scope of the powers, rights and duties of a guardian under ... the Family Law Act" ([1992) 175 CLR at 253) is confined to sterilization which is not "a by-product of surgery appropriately carried out to treat some malfunction or disease" (*ibid. at* 250). It is convenient to refer to sterilization which is not a by-product of such surgery as "planned sterilization".

There is nothing in the case stated to the effect that the proposed medical treatment of L is necessary either to save her life or to prevent serious damage to her health and the Court was informed that it can be assumed, for the purposes of the case, that the proposed medical procedure would involve the sterilization of L for reasons other than those mentioned in s. 45(2). The direct reason for it would be to preclude pregnancy and to prevent menstruation. That means that the questions in the case fall to be answered on the basis that the circumstances of the case are such that, subject to the effect of the Family Law Act and the jurisdiction of the Family Court, the proposed medical treatment of L would contravene the provisions of Pt 5.

The jurisdiction of the Family Court of Australia

Part VII of the Family Law Act 1975 (Cth) constitutes a broad legislative scheme relating to the maintenance, custody, guardianship and welfare of "a child of a marriage" (See s. 60F). Section 63(1), which is in Pt VII, confers jurisdiction on the Family Court "in relation to matters arising under this Part". The "welfare of a child of a marriage is a 'matter' which arises under Pt VII for the purposes of s. 63(1) and is, therefore, an independent subject which may support proceedings before the Family Court" (*Marion's* case [1992] 175 CLR at 257. Section 64(1) of the Family Law Act provides:

> In proceedings in relation to the custody, guardianship of welfare of, or access to, a child:
>
> ...
>
> (c) ... the Court may make such order in respect of those matters as it considers proper, including an order until further order.

It was held in *Marion's* case that, since 1983, Pt VII of the Family Law Act has invested the Family Court with a welfare jurisdiction in respect of a child of a marriage which encompasses the substance of the traditional *parens patriae* jurisdiction freed from the preliminary requirement of a wardship order (*ibid.* at 256, 294, 318). *Marion's* case also established that, putting to one side the effect of any valid and applicable State or Territory legislation, the welfare jurisdiction of the Family Court extends, in the case of an incapable child of a marriage, to the authorization of medical treatment, including

a medical procedure involving planned sterilization, where such treatment is necessary in the best interests of the child (*ibid.* at 254-260).

It follows that, subject to two important qualifications, *Marion's* case dictates an affirmative answer to the question whether the Family Law Act confers upon the Family Court the power to authorize the carrying out on L of the proposed medical treatment. The first qualification is that *Marion's* case related to the planned sterilization of a child who was resident in the Northern Territory and therefore did not involve problems arising from the division of Constitution. Obviously, the Family Law Act can confer jurisdiction upon the Family Court to authorize such medical treatment in the case of a child who, like L, is resident in a State only to the extent that it is within the legislative competence of the parliament to make a law conferring such jurisdiction. The second is that, in *Marion's* case, the law of the Northern Territory contained no legislative provisions regulating the carrying out of medical treatment involving sterilization such as those which are contained in Pt 5 of the Guardianship Act (see *ibid.* at 262-263, 308). Accordingly, it will be necessary to consider the relationship between the provisions of the Family Law Act which *prima facie* confer jurisdiction upon the Family Court to make an order of the kind sought in the present case. It is convenient to turn first to the question of the legislative power of the Commonwealth Parliament.

Commonwealth legislative power

As has been said, *Marion's* case arose in the Northern Territory. In a context where Pt VII of the Family Law Act contains separate express provision that the Part "applies in and in relation to the Territories" (Family Law Act, s. 60E(3)), the legislative competence of the Parliament to enact a law conferring jurisdiction upon the Family Court to make the order in that case could have been sustained by reference to s. 122 of the Constitution which confers a general legislative power to "make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth". However, examination of the majority judgment in *Marion's* case discloses that the Court's conclusion that the conferral upon the Family Court of the jurisdiction to make the relevant order was within the legislative power of the Parliament was neither confined to the Family Court's jurisdiction in respect of Northern Territory matters nor founded on s. 122 of the Constitution. That conclusion applied generally to the Family Law Act's conferral of jurisdiction to make an order of that kind in a case where the welfare of "a child of a marriage" (see *ibid.*, s. 60F(2)(a) and (b)) is involved. It was based upon the federal (i.e. "for the peace, order, and good government of the commonwealth": Constitution, s. 51) legislative powers conferred upon the Parliament by s. 51(xxi) with respect to "Marriage" and by s. 51 (xxii) with respect to "Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants". Having referred to those two paragraphs and to s. 122, Manson CJ, Dawson, Toohey and Gaurdon JJ. said (*Marion's* case [1992] 175 CLR at 261):

> It is clear enough that a question of sterilization of a child of a marriage arises out of the marriage relationship and that the sterilization of a child arises from the custody or guardianship of a child. Therefore, jurisdiction to authorize a sterilization is within the reach of power of the Commonwealth, quite apart from the operation of s. 122 of the Constitution.

Those comments constitute an integral part of the reasoning of the majority in *Marion's* case. They are, in any event, plainly correct.

The grants of legislative power contained in parts (xxi) and (xxii) of s. 51 of the Constitution are cumulative. Each must be given its full scope and effect. Neither is to be read down by reference to the other (see *Attorney-General (Vict.) v. The Commonwealth ("the Marriage Act Case")* [1962] 107 CLR 529 at 560, 572; *Russell v. Russell* [1976] 134 CLR 495 at 539; *Re F.; Ex parte F.* [1986] 161 CLR 376 at 387). Paragraph (xxi)'s grant of legislative power with respect to "Marriage" encompasses laws dealing with the protection or welfare of children of a marriage in so far as the occasion for such protection or welfare arises out of, or is sufficiently connected with, the marriage relationship (see, e.g. *Reg v. Lambert; Ex parte Plummer* [1980] 146 CLR 447 at 456; *Gazzo v. Comptroller of Stamps (Vict.)* [1981] 149 CLR 227 at 234-235, 247-248; *Fountain v. Alexaner* [1982] 150 CLR 615 at 632; *In the Marriage of Cormick* [1984] 156 CLR 170 at 175-176; *Re F.; Ex parte F.* [1986] 161 CLR at 382, 389-390). To a significant extent, that operation of par.(xxi) overlaps par.(xxii)'s express conferral of legislative power with respect to "parental rights, and the custody and guardianship of infants" in relation to "Divorce and matrimonial causes". The authorization of medical treatment of an incapable child of a marriage, including medical treatment of the kind involved in *Marion's* case and in this case, is something which is directly related to the protection and welfare of the particular child and which arises out of, and is itself an aspect of, the relevant marriage relationship. To the extent that the relevant provisions of Pt VII of the Family Law Act confer jurisdiction to give or withhold such authorization, they are a law with respect to marriage within s. 51(xxi). Moreover, the relevant provisions of Pt VII are, in the context of that conferral of jurisdiction upon the Family Court, directly concerned with parental rights and the custody and guardianship of infants in relation to divorce or matrimonial causes and are accordingly within the grant of legislative power contained in s. 51(xxii).

It will subsequently be necessary to refer to an argument based on Ch. III of the Constitution to the effect that the purported conferral of jurisdiction upon the Family Court involves an impermissible attempt to invest a federal Court with non-judicial power. Subject to that argument and to the effect of Pt 5 of the Guardianship Act, it follows from what has been said above that the Family Law Act validly invests the Family Court with jurisdiction to make the order sought by Mrs P in the present case.

The effect of Pt 5 of the Guardianship Act

Section 109 of the Constitution provides that, when any State law is inconsistent with a law of the Commonwealth, the Commonwealth law "shall prevail" and the State law "shall, to the extent of the inconsistency, be invalid. That means that, if there be any inconsistency between a Commonwealth law which confers jurisdiction upon a Federal Court and a State law, the Commonwealth law conferring the jurisdiction prevails and the State law is *pro tanto* invalid. Necessarily, the starting point for determining whether such inconsistency exists lies in an identification of the intended scope and operation of the Commonwealth law. If the Commonwealth law confers jurisdiction in terms which convey a legislative intent that its exercise is not to be confined or constrained by the prohibition or requirements of State laws, a question might arise about the extent to which s. 109 can give paramountcy to the Commonwealth law over state laws which are not directly related to the relevant head or heads of Commonwealth legislative power (see, e.g. *Ex parte McLean* [1930] 43 CLR 472 at 485-486; *Ansett Transport Industries (Operations) Pty. Ltd. v. Wardley* [1980] 142 CLR 237 at 279-280; and cf. *Colvin v. Bradley Brothers Pty. Ltd.* [1943] 68 CLR 151 at 158. Subject to that

question, s. 109 of the Constitution will, in such a case, invalidate any State law to the extent that it would directly or indirectly (e.g. by conferring authority on a State Court, instrumentality or officer) preclude, override or render ineffective the exercise by the federal Court of the jurisdiction so conferred. Conversely, if the terms of the Commonwealth law conferring jurisdiction or power convey a legislative intent that the jurisdiction or power must be exercised conformably with applicable prohibitions and requirements of State law, the jurisdiction conferred will, as a matter of construction, be accordingly confined with the result that there is no inconsistency for the purposes of s. 109.

A law of the Parliament conferring jurisdiction upon a federal Court in general terms will, in the absence of a clear legislative intent to the contrary, ordinarily be constructed as not intended to confer jurisdiction to make an order authorizing or requiring the doing of an act which is specifically prohibited and rendered criminal by the ordinary criminal law of the State or Territory in which the act would be done. Of course, the nature of the jurisdiction or the matters which have historically been determined in the exercise of that or a like jurisdiction may suffice to make clear such a contrary intent.

Quite apart from any question of constitutional power, the reason why a law conferring jurisdiction in general terms is to be construed in the manner indicated is that it is ordinarily to be presumed that it is the intent of the Parliament that jurisdiction conferred in general terms will be exercised in the context of, and within the confines imposed by, the ordinary criminal law of the relevant State or Territory. That approach to construction is *prima facie* applicable to the provisions of the Family Law Act conferring welfare jurisdiction with respect to children of a marriage upon the Family Court.

On the other hand, that ordinary approach to construction does not extend to the case where the State or Territory prohibition under criminal sanction is not imposed solely as part of the ordinary criminal law, but is imposed as an integral part of a statutory scheme conferring upon a local judicial or administrative body jurisdiction or powers which overlap or compete with the jurisdiction conferred by the Commonwealth law. Nor is it applicable to a case where the State or Territory prohibition is imposed as part of a general regulatory scheme which operates within the very area which the jurisdiction validly conferred by the Commonwealth law was intended to control. In such cases, there is no presumption that it was the intent of the Parliament that the jurisdiction conferred by the Commonwealth law should be overridden by, or subjected to, the prohibitions and requirements of the overlapping or competing State or Territory scheme. If, in such a case, the terms and operation of the commonwealth law disclose a legislative intent to cover the relevant field, s. 109 of the Constitution will apply to render invalid the state or territory law to the extent that it intrudes within the area validly occupied by the commonwealth law. If the terms and operation of the Commonwealth law disclose no such legislative intent, the existence and extent of inconsistency between the Commonwealth and the State or Territory laws will depend upon the terms and operation of each. Commonly, when that is so, the State or Territory law will be inconsistent with the Commonwealth law and invalid pursuant to s. 109 of the Constitution to, but only to, the extent that it would "alter, impair or detract from" (*Victoria v. The Commonwealth ("the Kakariki")* [1937] 58 CLR 618 at 630 per Dixon J. the Commonwealth law's conferral of jurisdiction by directly or indirectly precluding, overriding or rendering ineffective an actual exercise of that jurisdiction (see, generally, *Ex parte McLean* [1930] 43 CLR at 484-485; *Collins v. Charles Marshall Pty. Ltd.* [1955]

92 CLR 529 at 547-548; *T.A. Robinson & Sons Pty. Ltd. v. Haylor* [1957] 97 CLR 177 at 183; *Metal Trades Industry Association v. Amalgamated Metal Workers' and Shipwrights' Union* [1983] 152 CLR 632 at 642-643, 648). The practical effect of that *pro tanto* invalidity of the state or Territory law is that orders made in the exercise of the Commonwealth jurisdiction will prevail over the provisions of the State or Territory law or orders made or acts done in the exercise of power or authority which the State or Territory law purportedly confers.

As earlier mentioned, the State prohibition of a medical procedure involving planned sterilization of a person over the age of 16 years is not imposed as an absolute prohibition of such medical treatment of a person over the age of 16 years or as part of the ordinary criminal law. It is a prohibition which results from the combined operation of a general statutory scheme regulating the administration of significant medical or dental treatment to incapable persons by imposing a general prohibition of such treatment unless the particular treatment of the particular incapable person is authorized by the scheme without consent, consented to under the scheme, or authorized by an order of the Supreme Court of New South Wales in the exercise of its guardianship jurisdiction. That being so, the critical question for present purposes is not whether there would, for the purposes of s. 109 of the Constitution, be any inconsistency between some theoretical State law imposing a specific prohibition, under criminal sanction, of medical treatment involving planned sterilization of an incapable person and the relevant provisions of the Family Law Act. The critical question is whether there is any such inconsistency between the general prohibition of medical or dental treatment imposed by s. 35(1) as the basis of a general State medical welfare scheme applicable to incapable persons of or over 16 years of age and those provisions of the Family Law Act.

It is clear from *Marion's* case that, putting to one side the effect of any applicable State or Territory law, the welfare jurisdiction of the Family Court extends to authorizing or prohibiting medical or dental treatment of a child of a marriage both "in cases where parents have no power to consent (to such treatment) as well as cases in which they have the power" ([1992] 175 CLR at 259). Indeed, that jurisdiction in relation to medical treatment of a child lies at, or close to, the heart of a welfare jurisdiction which is applicable to that child. The general welfare jurisdiction of the Family Court in respect of children of a marriage was conferred upon it by the Family Law Amendment Act 1983 (Cth) (*ibid.* at 256). At the time, there was no New south Wales legislative scheme dealing with medical and dental treatment of incapable persons of the kind introduced by Pt 5 of the Guardianship Act in 1987. The Supreme Court of New South Wales had, however, long been vested with a wide *parens patriae* or guardianship jurisdiction. Clearly enough, it was not the intention of the Parliament, in conferring general welfare jurisdiction upon the Family Court in respect of children of a marriage, to cover the field and thereby deprive the State Supreme Court of any *parens patriae* or guardianship jurisdiction in respect of such children. Equally clearly, however, it was not the intention of the Parliament to subordinate the jurisdiction conferred by it on the Family Court, being part of the judicial power of the Commonwealth, to that which was conferred by State law upon the State Supreme Court. The intent of the Parliament, confirmed by the subsequent cross-vesting legislation of 1987 (see, in particular, Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)), was that both jurisdictions should exist concurrently. In the case of a conflict between orders made by the Family Court in the exercise of the jurisdiction conferred by the Family Law Act and orders made by the Supreme Court of New South Wales in the exercise of its jurisdiction, the orders made

by the Family Court would necessarily prevail. The State law, whether statutory or inherited, which conferred the relevant jurisdiction upon the Supreme Court would, to the extent that it purportedly gave legal efficacy to an order which was inconsistent with an order of the Family Court, be rendered invalid by s. 109 of the Constitution for the reason that it was "to that extent" inconsistent with the provisions of the Family Law Act giving legal efficiency to the order made by the Family Court (see, e.g., *Colvin v. Bradley Brothers Pty. Ltd.* [1943] 68 CLR at 163-164).

The medical welfare regime introduced by Pt 5 of the Guardianship Act would, if completely valid, effectively exclude the jurisdiction of any Court other than the State Supreme Court with respect to medical welfare matters relating to incapable persons over the age of 16 years. As a practical matter, the effect of that State scheme is, if the Family Court is bound to observe its provisions in the exercise of its welfare jurisdiction, to remove the medical welfare component from that jurisdiction in so far as it relates to incapable New South Wales children of a marriage who are aged 16 years or more. Putting to one side the insignificant exclusions from the definition of "medical or dental treatment" in s. 33(1) of the Guardianship Act and cases of urgent treatment, the Family Court could not, in New South Wales, authorize any medical or dental treatment of such a child in the exercise of its own welfares jurisdiction unless the "person responsible" or "guardian" (in the case of non-special treatment) or the Board consented to the treatment or unless the treatment was authorized by an order of the Supreme Court of New South Wales. That situation would result from the general prohibition contained in s. 35(1) of the Guardianship Act and the omission of any reference to orders made by the Family Court in the provisions of the State scheme providing for escape from that general prohibition. Indeed, if the prohibition contained in Pt 5 were applicable to preclude medical treatment authorized by the Family Court in the exercise of its general welfare jurisdiction, an extraordinary situation would exist. The Family Court's own medical welfare jurisdiction in respect of such children would have been effectively overridden and displaced by a medical welfare scheme established by a State law except to the extent that another State law, the Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW), conferred upon it part of the jurisdiction of the State Supreme Court which the State scheme had expressly recognized and largely confirmed.

The question arises whether it is possible to discern in the relevant provisions of the Family Law Act a legislative intent that the welfare jurisdiction conferred upon the Family Court should be susceptible of being so constricted by every scheme of the kind contained in Pt 5 of the Guardianship Act which might subsequently be introduced by the legislature of a State or Territory. In our view, the answer to that question is plainly in the negative. *Prima facie,* one would not anticipate a legislative intent either to subject the general welfare jurisdiction with respect to children of a marriage conferred by the Parliament upon a federal Court to every prohibition and constraint which might subsequently be imposed by a State or territory medical welfare scheme or to permit State or Territory laws to make the effective exercise of an important part of that jurisdiction of the Family Court dependent upon the exercise by a State or Territory Court or Board of powers or jurisdiction conferred or confirmed by such a State scheme. Nor is there anything at all in the relevant provisions of the Family Law Act which supports the existence of such a legislative intent. To the contrary, in those cases where the jurisdiction of the Family Law Court was intended by the Parliament to be excluded by reason of State or Territory welfare laws, s. 60H of the Family Law Act makes specific provision to that effect (see, in particular, s. 60H in relation to children under such welfare laws). It is common ground that, in circumstances where L is not a child under

the guardianship, or in the custody or care and control, of a person under a child welfare law, s. 60H does not exclude the jurisdiction of the Family Court to make the proposed order in the present case.

It follows that the general prohibition of "medical or dental treatment" of an incapable person imposed by s. 35(1) of the Guardianship Act is inconsistent with the provisions of Pt VII of the Family Law Act conferring welfare jurisdiction upon the Family Court to the extent that general prohibition would preclude or render ineffective an order by the Family Court authorizing such medical and dental treatment of an incapable child of a marriage aged 16 years or more. To the extent of that inconsistency, s. 35(1) of the Guardianship Act is rendered invalid by s. 109 of the Constitution. That does not, of course, mean that s. 35(1) is generally invalid in so far as it applies to children of a marriage. The invalidity under s. 109 is, like the inconsistency, confined to the purported operation of the State Act to prohibit treatment authorized by the Family Court in the exercise of the jurisdiction validly conferred upon it by the Family Law Act. As a practical matter, that invalidity will only be significant in a case where the Family Court exercises its jurisdiction to authorize particular medical treatment and then only in respect of that treatment.

Chapter III of the Constitution

There remains to be considered the submission that the provisions of the Family Law Act are inconsistent with Ch. III of the Constitution to the extent that they purportedly empower the Family Court to authorize an act which is inconsistent with the prohibition contained in s. 35(1) of the Guardianship Act. A power to dispense with compliance with a State criminal law is, so it was said, an executive power which is inconsistent with the essential character of a Court. The purported conferral of such an executive power upon a Ch. III Court, such as the Family Court, contravenes the Constitution's requirement that the powers of such a Court be exclusively judicial in their nature. The answer to that submission is, however, plain. It lies in the operation of s. 109 of the Constitution.

The relevant provisions of the Family Law Act do not purport to confer upon the Family Court jurisdiction to dispense with observance of the criminal law either of New South Wales or of any other State or Territory. They confer upon the Family Court a general welfare jurisdiction, with respect to a child of a marriage, which encompasses the making of an order authorizing medical treatment, involving planned sterilization, of such a child in circumstances such as those which exist in the present case. That jurisdiction corresponds with the traditional *parens patriae* jurisdiction. It is part of the judicial power of the Commonwealth.

The fact that s. 35(1) of the Guardianship Act was enacted subsequent to the conferral upon the Family Court of that general welfare jurisdiction neither changed the nature of the jurisdiction nor converted judicial power into something else. If, in the exercise of its jurisdiction, the Family Court makes an order which is inconsistent with the *prima facie* operation of s. 35(1) of the Guardianship Act, it is not the Family Court's order which overrides s. 35(1)'s prohibition. What has overridden s. 35(1)'s prohibition in such a case is s. 109 of the Constitution. For the reasons which have been given, s. 35(1) of the Guardianship Act is, to the extent that it would prohibit and render criminal what a competent order of the Family Court would authorize, inconsistent with the provisions of the Family Law Act validly empowering the Family Court to make such an order. That being so, the effect of s. 109 of the Constitution is that s. 35(1) of the Guardianship Act is invalid to the extent of that inconsistency.

Conclusion

It follows from what has been said above that each of the five questions in the stated case should be answered as follows:

1. Yes.
2. Yes.
3. Yes.
4. Yes. But only to the extent that s. 35(1) of the Guardianship Act 1987 (NSW) would prohibit medical or dental treatment authorized by a competent order of the Family Court of Australia.
5. Yes.

Brennan J:

The problem defined

The title to these proceedings suggests that there is some issue between Mrs P and Mr P awaiting determination by an exercise, of judicial power. In fact there is no controversy between them. Their daughter, L, now aged 16, is the subject of an application filed in the Family Court by Mrs P. Mrs P seeks an order that L be subjected to "medical treatment such that -

(i) she thereafter ceases to menstruate; and
(ii) she is permanently prevented from becoming pregnant.

The stated case contains a paragraph saying that L is "incapable of understanding the general nature and effect of the proposed treatment". Mrs P (the wife) has custody of L and both parents (whose marriage has been dissolved) think it would be in L's best interests to have her sterilized. They live in New South Wales where the sterilization of girls of or above the age of 16 years who are incapable of giving consent to their own sterilization is governed by Pt 5 of the Guardianship Act 1987 (NSW) (s. 34(1)). The objects of Pt 5 are stated in s. 32:

> The objects of this Part are:
>
> (a) to ensure that people are not deprived of necessary medical or dental treatment merely because they lack the capacity to consent to the carrying out of such treatment; and
> (b) to ensure that any medical or dental treatment that is carried out on such people is carried out for the purpose only of promoting and maintaining their health and well-being.

Treatment intended, or reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out is defined to be a class of "special treatment" (s. 33) which cannot lawfully be carried out unless the Guardianship Board, constituted under the Act, is satisfied that that treatment is necessary

(a) to save the patient's life; or
(b) to prevent serious damage to the patient's health (s. 45(2)).

Where the Board is so satisfied, it may consent to the treatment (s. 44). But s. 35 makes it an offence to carry out that class of special treatment without the Board's consent and a person who carries it out is guilty of an offence for which the maximum penalty is 7 years imprisonment.

The questions which arise for determination are raised because Mrs P and Mr P have made no application to the Board in respect of their daughter but rely on a jurisdiction which is said to be vested in the Family Court by virtue of Pt VII of the Family Law Act 1975 (Cth) (hereafter "Pt VII"). The jurisdiction which Mrs P seeks to invoke is not a jurisdiction to declare whether it would be lawful to procure the sterilization of L. A jurisdiction of that kind is extremely useful in cases where a procedure is of doubtful legality. Thus, when the question came before the Courts in England whether treatment should be withdrawn from Anthony Bland who was so irreversibly brain damaged as to be in a persistent vegetative state, Bingham M.R. and four Lords of Appeal approved the procedure of applying for a declaration as to the legitimacy of the course proposed: *Airedale N.H.S. Trust v. Bland* ([1993] AC 789 at 815-816 per Bingham M.R.; 859 per Lord Keith of Kinkel; 873, 874 per Lord Goff of Chieveley; 875 per Lord Lowry and 885 per Lord Browne-Wilkinson). But the jurisdiction invoked by Mrs P is of a different kind. She seeks an order which, by its terms, authorizes the sterilization of L, having the effect of making lawful what would otherwise be prohibited by s. 35 of the Guardianship Act.

The questions reserved for the opinion of this Court by the stated case are as follows:

1. Does the Family Law Act 1975 (C'th) purport to confer on the Family Court of Australia the power to make an order authorising a person to carry out on a child of a marriage treatment in New South Wales that is intended, or is reasonably likely, to have the effect of rendering the child permanently infertile, in circumstances where the carrying out of the treatment would otherwise be contrary to the Guardianship Act 1987 (NSW).
2. If yes to 1, is such purported conferral of power on the Family Court of Australia consistent with Chapter III of the Commonwealth Constitution?
3. If yes to 2, is such purported conferral of power on the Family Court Australia a valid exercise of the legislative power of the Commonwealth Parliament?
4. If yes to 3, except in cases to which s. 60H(2)(e) of the Family Law Act 1975 (C'th) applies, does that Act, by virtue of s. 109 of the Constitution, invalidate the Guardianship Act 1987 (NSW) to the extent that the latter Act purports to prohibit or authorise a medical procedure to be carried out on a child of a marriage that is intended, or is reasonably likely, to have the effect of rendering the child permanently infertile?
5. If yes to 4, will orders by the Family Court as sought by the applicant in this case provide a valid authority to a medical practitioner in New South Wales to carry out the procedure referred to?

Part VII should be construed, if its terms permit, so as to be within the power of the Parliament to enact it. If, so construed, it is within the power of the Parliament, it is unnecessary to answer questions 2 and 3. It is only if the terms in which the Family Court's jurisdiction is conferred compel the conclusion that Pt VII purports to confer a jurisdiction beyond power that it would be necessary to answer questions 2 and 3. As it is possible to construe Pt VII so as to be within power, the answer to question 1 will subsume the answers to questions 2 and 3.

The key provisions of Pt VII for the purpose of ascertaining the jurisdiction of the Family Court are s. 63(1), which confers on the Family Court "federal jurisdiction in relation to matters arising under this Part" and s. 64(1) which prescribes the manner in which the Court is to exercise its jurisdiction "[i]n proceedings in relation to the custody, guardianship or welfare of, or access to, a child". Neither of these provisions nor any other provision in Pt VII is expressed to confer a defined jurisdiction on the Family Court, but the draftsman has left to implication the conferral on the Court of a jurisdiction in custody, guardianship, welfare and access. The factors which s. 64 of the

Family Law Act direct the Family Court to consider in exercising its jurisdiction in proceedings in relation to the custody, guardianship or welfare of, or access to, a child give little indication of the scope of the jurisdiction. Paragraph (a) of s. 64(1) declares "the welfare of the child" to be the paramount consideration; par. (bb) (vi) allows the Court to take into account any fact or circumstance that "in the opinion of the court, the welfare of the child requires to be taken into account" and par.(c) empowers the Court to "make such order ... as it considers proper".

Section 64(1) in particular and Pt VII in general do not define the "welfare" jurisdiction though it, unlike the jurisdiction in custody, guardianship and access, is not a traditional or established head of curial jurisdiction. Its scope must therefore be ascertained by reference not only to the statutory context - which contains only slender *indicia* - but also by reference to the constitutional power to enact Pt VII and, in particular, to enact s. 64(1). In implying the existence of a "welfare' jurisdiction, it would be erroneous to imply a jurisdiction of a scope exceeding the jurisdiction which the Parliament is empowered to confer. For that reason, considerations of constitutional power are necessarily to be taken into account in answering question 1.

Counsel for Mrs P submitted that the term "welfare" in s. 64(1) of the Family Law Act is "not in any way limited in its scope", and thus the welfare jurisdiction is said to empower the Judges of the Family Court to authorize the sterilization of a child who is incapable of giving consent to the carrying out of that procedure (hereafter "an incompetent child"). As welfare is not defined by that Act - and cannot be exhaustively defined - the categories of orders which can be made in exercise of the welfare jurisdiction cannot be exhaustively stated. In that sense, it is right to say that the jurisdiction is not limited. But the problem is not to define the outer limits of the jurisdiction; it is to determine whether a Judge of the Family Court has power (as to jurisdiction and power see *Harris v. Caladine* [1991] 172 CLR 84 at 136 per Toohey J.) to make an order authorizing the non-therapeutic sterilization of an incompetent child in New South Wales (hereafter "a sterilization order"). The problem is whether, having regard to the provisions of Pt VII and the legislative powers available to support it, the welfare jurisdiction empowers a Judge of the Family Court to make a sterilization order.

I would answer that question in the negative, both on grounds of the general policy of the law and on particular grounds addressing propositions which are said to support an opposing view.

The general policy of the law

The starting point has to be the "fundamental principle, plain and incontestable" (per Robert Goff LJ in *Collins v. Wilcock* [1984] 1 WLR 1172 at 1177) that every person's body is inviolate. If the welfare jurisdiction empowers a Judge of the Family Court to form and to act upon an opinion that a non-consensual invasion of a child's body is for the child's welfare although the invasion is not necessary to save the child's life or to save her from serious bodily harm, the Judge's order offends that fundamental principle.

If the welfare jurisdiction extends to authorizing the sterilization of an incompetent child, it extends equally to the case of any child: s. 64(1) of the Family Law Act makes no distinction between children of different ages with different levels of comprehension. Of course, the level of comprehension is often relevant to the ascertainment of a child's welfare, but the scope of the jurisdiction is not ascertained by reference to the way in which the jurisdiction might be exercised. Further, if the welfare jurisdiction extends

to authorizing the sterilization of a child with parental approval, it extends equally to a case where parents object to the sterilization of their daughter: s. 64(1) empowers the Court to make orders against, as well as in conformity with, the wishes of a parent or guardian. Does the welfare jurisdiction empower a Judge of the Family Court to authorize the sterilization of any child irrespective of the wishes of the child, the parents or the guardians?

Courts are instruments of State power. Unless driven by legal imperatives, I would deny to any instrument of the State the power to authorize the invasion of the physical integrity of any person except to save that person's life or to save her from serious bodily harm. In particular, I would deny to any officer of the State the power to say: "This invasion is not to save you from death or bodily harm but it is for your own welfare as I, the agent of the State, see it". Courts and Judges, in the absence of governing legal principle or of guidelines more specific than "welfare" to control the exercise of such a daunting power, can rely only on their idiosyncratic perceptions of the circumstances. They are in no special position to form a judgement in a matter of such gravity. But, if the jurisdiction be accorded the broad scope claimed by Counsel for Mrs P and Counsel for the Commonwealth, the Family Court and its Judges would be in a special - and unenviable - position to carry their opinion into effect without the consent of the incompetent child and, if need be, over the objection of her parents and guardians. Even in the imposition of criminal punishment we have passed beyond the stage where invasions of personal integrity are judicially authorized. When the scope of the welfare jurisdiction is undefined by the Family Law Act, I am unable to construe the bare term "welfare" in such a way as to arm a Judge with power to make an order authorizing a serious and irreversible invasion of personal integrity.

What could the justification for an order authorizing the compulsory sterilization of an incompetent child when - indeed, because - she is intellectually incompetent? If it be said simply that non-therapeutic sterilization is in the best interests of some children and that the welfare jurisdiction must be extended in order to permit the making of orders for non-therapeutic sterilization, there are two responses which, to my mind, are compelling: first, that proposition runs counter to the fundamental common law principle of personal inviolability (to which Pt 5 of the Guardianship Act gives effect); and, second, in each case, an opinion that a particular child will be better off if she is sterilized is either speculative or formed on the basis that the child will be left without other protection against undesirable sexual access. Perhaps it should not be left out of account that if a child who is sterilized pursuant to an order made by a Judge of a superior Court learns what has been done to her and complains, she has no redress. The Judge bears no responsibility for the carrying out of the order; the surgeon, anaesthetist and staff who act under a judicial order in sterilizing a child are protected by the order.

Although these are very general considerations they are nonetheless important for they influence the path of legal development. They are relevant because this case may be used as an analogy in future cases where a question arises as to the power of Judges to authorize the invasion of a person's physical integrity. However, there are more particular considerations which also lead to the conclusion that the welfare jurisdiction does not empower the Judges of the Family Court to make a sterilization order.

But I must refer next to the case in which this Court first considered the jurisdiction to make a sterilization order.

Marion's Case (Secretary, Department of Health and Community Services v. J.W.B. and S.M.B. [1992] 175 CLR 218

Much reliance was placed on this case by Counsel for Mrs P and Counsel for the Commonwealth. In *Marion's* case a majority of this Court held that the welfare jurisdiction empowered the Family Court to authorize the sterilization of an intellectually disabled teenage girl in the Northern Territory. The majority judgment (Mason CJ, Dawson, Toohey and Gaudron JJ.) made it clear that the "sterilization" therein referred to was not "sterilization which is a by-product of surgery appropriately carried out to treat some malfunction or disease" (*ibid.* at 250); it was non-therapeutic sterilization. (As sterilization is the surgical excision or destruction of the essential organs of generation, not a by-product of the procedure, I prefer a classification which points to the purpose for which the surgery is performed: therapeutic.) For reasons which I stated in *Marion's* case, I would deny that the Parliament has vested jurisdiction in the Family Court to authorize the non-therapeutic sterilization of a child. I am unable, with respect, to accept the legal validity of the steps in the reasoning of the respective majorities in *Marion's* case and in this case. Accordingly, I must state my reasons not only by reference to what I have already said in *Marion's* case (to which I adhere) but by reference to what I apprehend to be the steps which have led the majorities to their conclusion.

The majority judgment in *Marion's* case accepted that parents generally have the power to consent to medical treatment of a child who is incapable of giving valid consent *(ibid.* at 239-240), but their Honours were of the opinion that "factors involved in a decision to authorize sterilization of another person ... indicate that, in order to ensure the best protection of the interests of a child, such a decision should not come within the ordinary scope of parental power to consent to medical treatment. Court authorization is necessary and is, in essence, a procedural safeguard." *(ibid.* at 249). This observation was not linked, in that part of the judgment, to the welfare jurisdiction of the Family Court. The reasons assigned for the opinion that Court authorization is required were (*ibid.* at 250):

> first, because of the significant risk of making the wrong decision, either as to a child's present or future capacity to consent or about what are the best interests of a child who cannot consent, and secondly, because the consequences of a wrong decision are particularly grave.

It was held that, if a valid Court authorization were obtained, the prohibition against the non-consensual application of force contained in the Criminal Code (NT) (ss. 187, 188 of the Code, scheduled to the Criminal Code Act 1983 (NT)) was lifted by s. 26(1)(d) of the Code which exempts from criminal liability an act done "pursuant to authority ... lawfully granted" ([1992] 175 CLR at 232, 262). It should be noted that no question arose to an inconsistency between a Court order and a State law (see *ibid.* at 262., 308).

Having held that Court authorization was needed in *Marion's* case, the question arose whether the jurisdiction to grant that authorization was vested in the Family Court of Australia. It was pointed out that "there is no express power to authorize sterilization conferred by the Family Law Act" (*ibid.* at 236). Part VII of the Family Law Act, or ss. 63(1) and 64, construed in the light of the amendments made in 1983 (Family Law Amendment Act 1987) and 1987 (Family Law Amendment Act 1987), conferred on the Family Court jurisdiction with respect to the welfare of a child (*Marion's* case [1992] 175 CLR at 257; cf. amendment of s. 64 by s. 63 of the Family Law Amendment Act 1987 (Cth)). Their Honours held that that jurisdiction was "similar to the *parens patriae*

jurisdiction, without the formal incidents of one of the aspects of that jurisdiction, the jurisdiction to make a child a ward of Court" *(ibid.* at 256). The welfare jurisdiction, which is exercised in the "best interests of the child" (*ibid.* at 260), was acknowledged to have limits on its scope *(ibid.* at 261). However, if the two jurisdictions be similar, it is impossible to say what those limits are (*ibid.* at 258). The powers of the Court exercising the welfare jurisdiction were said to be greater than the powers possessed by parents or guardians *(ibid.* at 259, 302, cf. 282-283). Their Honours held that the Family Court had power to make a sterilization order even though parents and guardians could not give a valid consent to the operation (*ibid.* at 259).

The majority judgment then turned to the constitutional implications of holding that the Family Law Act invested the Family Court with jurisdiction to authorize sterilization. Their Honours said (*ibid.* at 261):

> So long as an order of the Family Court is constitutional, there can be no limitation on the Court's powers emanating from the need to preserve the scope of State legislative powers. To hold otherwise would be, as Counsel for the Commonwealth said, to take the law back beyond the *Engineer's case* (*Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* [1920] 28 CLR 129).
>
> It is clear enough that a question of sterilization of a child of a marriage arises out of the marriage relationship and that the sterilization of a child arises from the custody or guardianship of a child. Therefore, jurisdiction to authorize a sterilization is within the reach of power of the Commonwealth, quite apart from the operation of s. 122 of the Constitution." (The reference to s. 122 flows from the fact that *Marion's* case concerned a proposed sterilization to be carried out in the Northern Territory)

The effect of their Honours' view on the operation of a law of the State of New South Wales (Children (Care and Protection) Act 1987 (NSW), s. 20B) which prohibited sterilization of a child without the consent of the Supreme Court - a consent which could be given only if necessary to save the child's life or to prevent serious damage to the child's health - was left for another day (*Marion's* case [1992] 175 CLR at 263). That day has now arrived.

The present majority, building on the reasoning in *Marion's* case holds that s. 35(1) of the Guardianship Act (hereafter "s. 35(1)") which prohibits the carrying out of a procedure for the sterilization of a child of L's age without the consent of the Guardianship Board is inconsistent with the provisions of Pt VII and is, to the extent of the inconsistency, invalid by reason of s. 109 of the Constitution. The inconsistency is found in the prohibition by s. 35(1) which would preclude or render ineffective an order authorizing the sterilization of an incompetent child aged 16 years of more, being a child of a marriage.

The steps which I would identify in this combined reasoning are as follows:

1. The Criminal Code Act 1983 (NT) prohibited the proposed sterilization of an incompetent child.
2. Parents and guardians have no power to consent to non-therapeutic sterilization of an incompetent child.
3. The power to authorize the non-therapeutic sterilization of an incompetent child is reserved to a Court as a "procedural safeguard" (*ibid.* at 249).
4. If a Court validity authorizes sterilization, the application of the force involved in sterilizing the child does not amount to an unlawful assault for the purposes of the Criminal Code Act 1983 (NT) and the carrying out of the sterilization is lawful.

5. The welfare jurisdiction of the Family Court is similar to the *parens patriae* jurisdiction but is shorn of the "formal incidents" *(ibid.* at 256) of the jurisdiction to make a child a ward of Court. It empowers the Family Court to authorize the non-therapeutic sterilization of an incompetent child even though the parents or guardians of the child are incapable of consenting to that procedure.
6. A State law forbidding the non-therapeutic sterilization of an incompetent child is inconsistent with the conferral of the welfare jurisdiction carrying the power to authorize such a procedure, the inconsistency being to the extent that that jurisdiction is exercised to grant an authorization.
7. Therefore s. 35(1), as a State law, is ineffective to prevent the exercise of that jurisdiction by the Family Court in the case of L.

For reasons which I have stated in *Marion's* case, I agree with steps 1 and 2. Step 4 has no relevance to the present case. In my respectful opinion, none of the steps 3, 5, 6, and 7 should be followed. These steps call for consideration of two related issues: the approach to the construction of "welfare" in s. 64(1) of the Family Law Act and the limits of the power contained in s. 51(xxi) of the Constitution (the marriage power). My reasons for rejecting the steps 3, 5 and 6 (and consequently step 7) can be conveniently stated under headings corresponding with those steps.

Step 3: The availability of a curial power to authorize non-therapeutic sterilization

In construing "welfare" in Pt VII in order to ascertain whether it imports a power in a Judge of the Family Court to make a sterilization order, it is not appropriate, in my respectful opinion, to begin with the proposition that, since parents and guardians cannot consent to the procedure, there must be power in a Court to authorize the non-therapeutic sterilization of a child. It is fallacious to start with an assumption that, in default of any competent repository, the power must be reposed in a Court. In principle, it is erroneous to assume that a power is reposed in a Court merely because it is thought desirable or convenient that the power be available. The notion that it is the duty of a Judge to extend his or her jurisdiction ("*boni judicis est ampliare jurisdictionem*") was derived from times when Judges were paid by the fees taken for cases decided (*Scott v. Scott* [1930] 1 DLR 53 at 56). The Courts declared the Latin maxim to be a false text (*Dart v. Dart* [1863] 3 Sw & Tr 208 [164 ER 1254]); the true maxim substituted "*justitiam*" for "*jurisdictionem*" (*Arg. R. v. Williams* [1695] 13 St Tr 1369 at 1430; *R v. Philips* [1757] 1 Burr 292 at 304 [97 ER 321 at 327), focusing on the available remedies, not on the jurisdiction to grant a remedy in a particular class of case. It would be "a curious thing" in our jurisprudence, said the Earl of Halsbury LC in *Cowley v. Cowley* ([1901] AC 450 at 454), "if because a thing might be considered convenient, and, I will assume for the sake of argument, desirable, therefore you could invent a new jurisdiction and apply it to a matter with which that Court has no concern whatever". Courts have the function of declaring the law, including the law which confers and governs their jurisdiction, but they cannot enhance their powers in order to give effect to a view that the enhancement is needed.

The principal that no new power should be assumed by a Court is not a mere relic of antiquarian law ready for overturning. It is at the heart of the political and constitutional theory of the separation of powers and thus an important guarantee of a free society. If Courts were able to assume powers which are neither part of their inherent or traditional jurisdiction nor part of a jurisdiction conferred by the legislature, the assumed powers would be despotic, uncontrolled by legislative prescription or other law.

Take the power in question in this case. If the general law protects the physical integrity of incompetent children and prohibits their parents or guardians from subjecting them to non-therapeutic sterilization, it is indeed a curious thing that a Court should so interpret "welfare" as to assert a power to be a "procedural safeguard" of the child's welfare. The safeguardian of the incompetent child would assume a power to subject her to sterilization, even against the objection of parents or guardians, and the power is subject to no rule; it is governed only by the Judge's opinion that it is the child's "best interests" to do so.

Moreover, it would be questionable legal policy to assert a power governed by such a wide discretion to authorize the invasive and irreversible procedure of sterilization. True it is that the exercise of many novel discretionary powers come to be guided by precepts derived from experience in their exercise (*United Engineering Workers' Union v. Devanayagam* [1968] AC 356 at 384C per Lord Guest and Lord Devlin), but the diversity of values and circumstances which would affect decisions to make sterilization orders precludes any realistic expectation that decisions would not be made according to the idiosyncratic opinion of individual Judges.

Step 5: The parens patriae jurisdiction, the welfare jurisdiction and the effect of State law

A Court in which the *parens partiae* jurisdiction is vested exercises the prerogative power of the Crown (per Lord Donaldson of Lymington M.R. *In re R. (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11 at 25). *In Re Eve* ([1986] 31 DLR (4th) 1), in a passage referred to with approval by Lord Halisham of St Marylebone LC in *In re B. (A Minor)* ([1988] AC 199 at 203) and by the majority in *Marion's* case ([1992] 175 CLR at 258), La Forest J. explained that, although the *parens patriae* jurisdiction has its origin in the Crown's power over and responsibility for the mentally incompetent, the wardship jurisdiction had its origin as a property right arising out of the feudal system of tenures. Nevertheless, wardship became the "device by means of which Chancery exercises its *parens patriae* jurisdiction over children" ([1986] 31 DLR (4th) at 14). Lord Donaldson M.R. pointed out in *In re C. (Wardship: Treatment)* (No. 2) ([1990] Fam 39 at 46):

> The origin of the wardship jurisdiction is the duty of the Crown to protect its subjects and particularly children who are the generations of the future. It is exercised by the Courts on behalf of the Crown: see in *In re X (A Minor) (Wardship: Jurisdiction)* ([1975] Fam 47 at 52 per Latey J.). The machinery for its exercise is an application to make the child a ward of Court. Thereafter, the Court is entitled and bound in appropriate cases to make decisions in the interests of the child which override the rights of its parents. Furthermore, the Court is entitled, and bound in appropriate cases, to make orders affecting third parties which the parents could not themselves have made.

Where a child is made a ward of Court, the Court itself assumes responsibility for the child's welfare, albeit that responsibility may be delegated in most matters to a custodian. There is no definitional limit to the scope of the wardship jurisdiction (*ibid.* at 50, 57, 60) but that jurisdiction does not empower the Court to make an order in respect of a subject within the power of another repository. Thus, in *A. v. Liverpool City Council* ([1982] AC 363 at 377), Lord Roskill said:

> I am of the clear opinion that, while the prerogative jurisdiction of the Court in wardship cases remains, the exercise of that jurisdiction has been and must continue to be treated as circumscribed by the existence of the far-ranging statutory code which entrusts the

> care and control of deprived children to local authorities. It follows that the undoubted wardship jurisdiction must not be exercised so as to interfere with the day-to-day administration by local authorities of that statutory control.

And, in *In re W.* ([1985] AC 791 at 807. See also *In re Mohamed Arif (An Infant)* [1968] Ch 643 at 662; *In re J.S. (a Minor)* [1990] Fam 182; and *In re R (Wardship: Criminal Proceedings)* [1991] Fam 56 at 66), Lord Brightman said:

> Although the prerogative jurisdiction of the High Court in wardship cases remains, nevertheless the exercise of that jurisdiction has been and must continue to be treated as circumscribed by the existence of the statutory code. Therefore, where the Court perceives that the action sought of it is within the sphere of discretion of the local authority, there is generally no case for the existence of a wardship order. It is not the function of the High Court to supersede the statutory code, or to control the exercise by the local authority of discretions committed by Parliament to that body, or to supervise the exercise of the statutory powers of the local authority, except within the limits of judicial review.

In principle, no prerogative power can be exercised contrary to statute and the historical transmogrification of the *parens patriae* power into a curial jurisdiction is no exception. In *In re W.* ([1985] AC at 802), Lord Scarman declared one of the basic rules of our law to be "the obedience of our Courts to the enacted will of Parliament". If it be right to say, as the majority judgement in *Marion's* case said, that the welfare jurisdiction vested in the Family Court is "similar to the *parens patriae* jurisdiction", it would not confer on the Court the power to make an order authorizing the sterilization of a child in New South Wales contrary to the provisions of s. 35(1). "A Court of law", said Earl Loreburn L.C. (*Attorney-General v. Birmingham, Tame, and Rea District Drainage Board* [1912] AC 788 at 795), "has no power to grant a dispensation from obedience to an Act of Parliament".

This Court and the Family Court are bound by the laws of the State (Constitution s. 118 and see also the Judiciary Act 1903 (Cth), s. 79) except to the extent to which a State law is inconsistent with a valid law of the Commonwealth. If there be no inconsistency between Pt VII of the Family Law Act and s. (35) of the Guardianship Act, the Family Court is bound by s. 35(1). In that case, the analogy between the welfare jurisdiction and the *parens patriae* jurisdiction would not lead to the conclusion that an order be made in flat contradiction of s. 35(1). Hence the welfare jurisdiction could not be held to extend to the making of a sterilization order.

The powers conferred by the vesting of the welfare jurisdiction are discretionary. In vesting that jurisdiction, Pt VII does not expressly authorize the Family Court to disregard the provisions of applicable State laws. Nor does the general subject matter of "welfare" impliedly authorize that Court to do so. It would be a misconception of the effect of the Constitution to treat the grant of a general discretionary power under a Commonwealth law as authorizing the repository of the power to disregard an applicable law of a State. The Constitution prescribes the priority of conflicting commonwealth and State laws (covering cl. 5 and the Constitution, s. 109) and creates an integrated system of Australian law applicable to a given set of circumstances. All the provisions of that integrated system of law must be observed by the repositories of discretionary powers, whether the discretion be derived from the laws of the Commonwealth or the laws of a State. Of course, by reason of s. 109 of the Constitution, a valid law of the Commonwealth which confers a discretionary power may provide, or the

subject matter of the power may indicate, that the repository of the power is free, in exercising the discretion, to disregard the laws or some of the laws of a State.

Part VII contains no indication that the Parliament intended the welfare jurisdiction to be exercised in disregard of the applicable laws of a State. In the present case, there is no reason why s. 35(1) should be thought to be inconsistent with the exercise of the welfare jurisdiction save a view that s. 35(1) is inconsistent with the welfare of the child. That is a view which, in my respectful opinion, a Court cannot reach with respect to a child to whom Pt 5 of the Guardianship Act applies. Bearing in mind that the scope of the welfare jurisdiction is to be ascertained by construing the term "welfare" in s. 64(1) of the Family Law Act, it would be erroneous to conclude that the welfare jurisdiction comprehends a power to authorize what s. 35(1) prohibits. If any assumption is to be made in construing "welfare", it is that s. 35(1) prohibits what is inimical to the welfare of the child.

Obedience to s. 35(1) is owed not only by the parents of a child but by all New South Wales hospitals, medical and para-medical personnel, and any others who might otherwise be concerned in a proposal to sterilize an incompetent child. If the welfare jurisdiction empowers a Judge of the Family Court to dispense all of these people from obedience to s. 35(1), the welfare jurisdiction is not only wider than the *parens patriae* jurisdiction; it is different in kind. The cases in which the Courts, in exercise of the *parens patriae* jurisdiction, have made orders which parents or guardians have no power to make are cases in which third parties, who are contemplating what would otherwise be a lawful act, have been restrained from acting to the determine of a ward of Court. The *parens patriae* jurisdiction has never been exercised to authorize third parties to commit a criminal act. It is axiomatic that there is no such jurisdiction.

One of the distinctive characteristics of a judicial proceeding is that the tribunal before which the proceeding is pending exercises its jurisdiction according to laws which bind it and the parties before it equally (*Giese v. Williston* [1963] 37 DLR (2d) 447 at 448). Section 35(1) binds Mrs P, L and any other person in New South Wales prior to any exercise by the Family Court of its welfare jurisdiction and it remains the law thereafter. If it bound the parties when the proceeding commenced, how do they cease to be bound thereafter? No order made by the Family Court can alter the law of New South Wales. It does not have the effect of a law of the Commonwealth or of an industrial award made under Commonwealth law pursuant to which rights and obligations under a State law are changed and a new set of rights and obligations are created. If the welfare jurisdiction extends to the making of a sterilization order, s. 35(1) must first be deprived of the force of law. That can be effected only by a law of the Commonwealth with which s. 35(1) is inconsistent.

Unless Pt VII is a law with which s. 35(1) is inconsistent, s. 35(1) stands as a valid State law binding on the Family Court. The present case is, in this respect, distinguishable from *Marion's* case where s. 26(1)(d) of the Criminal Code (N.T.) allowed for the lifting of the general prohibition imposed by the Code against the non-consensual application of force to the person of another. Under that Code, any repository of the power to authorize sterilization could lift the prohibition. The majority held that the Family Court, having power to grant an authorization, could appoint a person "for the limited purpose of consenting" and that person's consent would, by reason of s. 26(1)(d) of the Code, lift the prohibition against the non-consensual application of force to the incompetent child ([1992] 175 CLR at 261-262). But consent by a person other than the

Board does not lift the prohibition on sterilization imposed by s. 35(1). That prohibition can be lifted only by denying to s. 35(1) the force of law.

Step 6: Inconsistency between Pt VII s. 35(1)

There is no necessary inconsistency between the two laws. If the welfare jurisdiction is understood as conferring discretionary powers to be exercised in accordance with laws of general application, the welfare jurisdiction cannot be held to the making of an order inconsistent with s. 35(1). The only source of possible inconsistency arises if the view is taken that non-therapeutic sterilization is or may be for the welfare of an incompetent child and that view is translated into a determination that the welfare jurisdiction extends to the making of a sterilization order

If the welfare jurisdiction is to be held to extend to the making of a sterilization order in respect of a child in New South Wales, s. 35(1) must be overridden - not by the order itself but by the law (relevantly, Pt VII) which empowers the Court to make the order. An analogy - *albeit* an imperfect analogy - can be found in the operation of a federal industrial award made in exercise of an arbitral power conferred by a law enacted under s. 51 (xxxv) of the Constitution. In *Metal Trades Industry Association v. Amalgamated Metal Workers' and Shipwrights' Union* ([1983] 152 CLR 632 at 648-649), Mason, Brennan and Deane JJ. said:

> Because it has been thought that an award pursuant to the Conciliation and Arbitration Act 1904 (Cth), as amended, ('the Act') is not a law of the Commonwealth within the meaning of s. 109, inconsistency between an award and a State law must be reduced to inconsistency between the State law and the provision in the Act authorizing the making of the award so as to constitute it an exhaustive and exclusive regulation of the relevant subject-matter (*T.A. Robinson & Sons Pty. Ltd. v. Haylor* ([1957] 97 CLR 177 at 182])). In this respect s. 65 of the Act (s. 30 of the Act of 1904) is of paramount importance for it is the expression of the statutory intention that the arbitrator's exercise of power is to operate to the exclusion of any State law.

Section 65 of the Act provided:

> Where a State law, or an order, award, decision or determination of a State Industrial Authority, is inconsistent with, or deals with a matter dealt with in, an award, the latter prevails and the former, to the extent of the inconsistency or in relation to the matter dealt with, is invalid.

Then, in *Dao v. Australian Postal Commission* ([1987] 162 CLR 317 at 337), Mason CJ, Wilson, Deane, Dawson and Toohey JJ., after reference to a number of cases relating to the operation of s. 109 said:

> Illustrative though these cases are of the operation of s. 109 of the Constitution in a situation where it is said that a State law is inconsistent with the provisions of an award made or agreement registered under the Conciliation and Arbitration Act, it must be remembered that in those circumstances the question of inconsistency can arise only because of the provisions of s. 65 of that Act. The cases therefore are to be understood in the way explained by the Court in *T.A. Robinson & Sons Pty. Ltd. v. Haylor* and discussed again in the *Metal Trades* case to which we have referred ([1983] 152 CLR at 641-642, 646, 648-652).

These cases deny that the exercise of a power by its statutory repository is a law of the Commonwealth which can engage the operation of s. 109 of the Constitution. Therein lies the analogy with the present case. No order made under Pt VII is a law of the Commonwealth. But that is where the analogy ends.

The present case is different. In the cases under the Conciliation and Arbitration Act, s. 65 expressed a statutory intention that the award should operate to the exclusion of State law. Part VII, by contrast, neither purports to make an order of the Family Court a law of the Commonwealth nor provides that an order should operate to the exclusion of State law. There is nothing in Pt. VII which is comparable with s. 65. However, if there were such a provision, it would have to be supported by one or more of the constitutional heads of legislative power. No doubt the Parliament can confer on a federal Court jurisdiction to make an order inconsistent with a State law, but only by an enactment which, in excluding the application of the State law, finds support for the exclusion in a head of legislative power.

Constitution, s. 51(xxi) and (xxii)

The only relevant head of legislative power which might support a legislative exclusion of s. 35(1) is the marriage power (constitution, s. 51 (xxi) perhaps together with the power with respects to divorce and matrimonial causes (constitution, s. 51 (xxii). These powers were supplemented by powers referred to the Commonwealth by the Commonwealth Powers (Family Law - Children) Act 1986 (NSW) but the powers referred by that Act related to custody and guardianship of and access to children, not to their "welfare" (Commonwealth Powers (Family Law - Children) Act, s. 3(1)(b)) and the powers of the Guardianship Board were clearly outside the powers referred (*ibid*., s. 3(2)(d)).

The marriage power extends to the creation, declaration and definition of the rights and duties arising out of the marriage relationship including rights to the custody or guardianship of or access to a child of the marriage (*Vitzdamm-Jones v. Vitzdamm-Jones* [1981] 148 CLR 383 at 414; *Fountain v. Alexander* [1982] 150 CLR 615 at 625-626, 631-632, 646-647; *V v. V.* [1985] 156 CLR 228 at 232-233) and the authority of parties to a marriage over, or their obligations to protect and nurture, a child of their marriage (*In the Marriage of Cormick* [1984] 156 CLR 170 at 175-176; *Reg v. Cook; Ex parte C.* [1985] 156 CLR 249 at 257; *Re F.; Ex parte F.* [1986] 161 CLR 376 at 399-400). But the marriage power does not support a law governing a subject matter that does not arise out of the marriage relationship (*Reg v. Lambert; Ex parte Plummer* [1980] 146 CLR 447 at 456-457; *Dougherty v. Dougherty* [1987] 163 CLR 278 at 288, 293). Nor does the marriage power support the exclusion of a State law which binds the parties to a marriage and the children of a marriage in common with other members of the community and governs a discrete subject matter that does not arise out of the marriage relationship. In *Reg. v. Lambert; Ex Parte Plummer* ([1980] 146 CLR at 461) Stephen J. said:

> In our federation, the Commonwealth has some legislative power, concurrently with the States, with respect to the custody of infants. At the same time the States possess and exercise wide powers to legislate for the welfare of children, including the manner of their upbringing. From this distribution of legislative powers collisions between State and Federal law may result, but the occasion for them will be much reduced if custody is recognized for what it is: the right of the guardian to make and carry out such choices concerning a child's upbringing as, in the case of any particular child, the current state of the general law, whether State or Federal, permits. State laws which only operate to restrict the choices open to guardians regarding children's upbringing, being laws which apply generally to all members of the community or to all children in the community, can then be seen to provide no occasion for collision. There will then, for example, be no question of conflict between State educational or criminal laws and a federal law under which custody is given to a particular parent: State laws which prevent that parent from

> keeping his child at home, untaught, or from being sent to a reformatory, will then not be seen to conflict with the parent's federally conferred custody.

I respectfully agree. State laws governing education or criminal punishment which apply to all members of the community cannot be excluded by a purported law supported solely by the marriage power. The marriage relationship and what arises from the marriage relationship exist in the legal context of State laws of general application. The legislative power of the Commonwealth under s. 51(xxi) of the Constitution does not extend to the exclusion of laws of general application in which the marriage relationship and what arises from the marriage relationship exist. Part 5 of the Guardianship Act is a law of general application governing a subject matter that does not arise out of the marriage relationship; it affects children of marriages and other children indifferently.

In *Marion's* case ([1992] 175 CLR at 261) the majority judgement cited what Gibbs CJ said in *Fountain v. Alexander* ([1982] 150 CLR at 627):

> The power of the Parliament to make laws with respect to marriage does not extend to laws for the protection or welfare of the children of a marriage except in so far as the occasion for their protection or welfare arises out of, or is sufficiently connected with, the marriage relationship.

Their Honours thought it "clear enough" that a question of sterilization of a child of a marriage arises out of the marriage relationship. With respect, if we speak (as their Honours were speaking) of a non-therapeutic sterilization, how can the question arise out of the marriage relationship? The parties to the marriage cannot authorize it; nor can an incompetent child. Even if one postulates that non-therapeutic sterilizaton can be for the welfare of some children, the occasion for authorizing the sterilization of a child arises simply because the child is incompetent and nobody else has power to authorize the sterilization. That "occasion" does not arise out of a marriage relationship or because a child is a child of a marriage.

Neither the marriage power nor the divorce and matrimonial causes power would support a law which excludes the operation of a law governing the non-therapeutic sterilization of all incompetent children. If Pt VII purported to exclude the operation of s. 35(1), to that extent Pt VII would lack constitutional support.

For these reasons, I would therefore answer question 1: No.

It is unnecessary to answer the other questions.

Dawson J:

This case raises the question whether the Family Law Act 1975 (Cth) empowers to make an order overriding the prohibition imposed by the Guardianship Act 1987 (NSW) against the sterilization of a person over the age of sixteen years who is incapable of giving consent where that treatment is necessary neither to save that person's life nor to prevent serious damage to that person's health. This case concerns L, a sixteen year old girl who is intellectually disabled, with the mental ability of a child between three and and seven years old. Her mother, who has custody of L, has sought an order from the Family Court authorizing all necessary consents to an operation which will cause L to cease to menstruate and permanently prevent her from becoming pregnant.

The prohibition imposed by the Guardianship Act is part of a wider scheme dealing with the medical or dental treatment of persons under a disability. The relevant provisions

are set out in the judgment of Manson CJ, Deane, Toohey and Gaurdon JJ. and it is unnecessary to repeat them. It is sufficient to say that the treatment which the mother seeks for L is not necessary to save L's life or to prevent serious damage to her health, and for that reason the procedure for obtaining the consent of the New South Wales Guardianship Board, which would otherwise apply under the New South Wales Guardianship Act, is unavailable (s. 45(2)). It should also be observed that the prohibition is imposed against the person carrying out the treatment (s. 35(1)). That is to say, it is imposed upon the medical practitioner or other person who would carry out the treatment if the requisite consent could be given.

In *Secretary, Department of Health and Community Services v. J.W.B. and S.M.B.* (*Marion's* case) ([1992] 175 CLR 218) this Court held that under Pt VII of the Family Law Act the Family Court has a jurisdiction with respect to the welfare of a child akin to the *parens patriae* jurisdiction originally vested in the English Court of Chancery. It is a jurisdiction which does not, in the case of the Family Court, require a child to be made a ward of Court as a prerequisite to its exercise *(ibid.* at 257, 294, 317-318). Section 63(1) confers jurisdiction on the Family Court in relation to matters arising under Pt VII. Those matters are not specified, but s. 64(1) sets out the factors to be considered in proceedings in relation to "the custody, guardianship or welfare of, or access to, a child".

It was held in *Marion's* case that the Family Court's jurisdiction extended to authorizing the sterilization of an intellectually disabled child in the Northern Territory. The effect of the authorization was that the treatment did not amount to an unlawful assault which, in the absence of authority, it might have been (see Criminal Code Act 1983 (NT), ss. 26, 187, 188). The treatment was not otherwise prohibited in the Northern Territory.

It was recognized in *Marion's* case that the child welfare jurisdiction of the Family Court has limits ([1992] 175 CLR at 257, 294, 318). Those limits do not appear from the Act itself. Section 64(1), for example, simply provides:

> In proceedings in relation to the custody, guardianship or welfare of, or access to, a child:
>
> (c) ... the Court may make such order in respect of those matters as it considers proper, including an order until further order.

The Family Court's power is limited by the Constitution rather than the Act. The Commonwealth Parliament has limited legislative power to bestow jurisdiction on the Family Court. Consequently the apparently unlimited jurisdiction which the Act purports to confer with respect to the welfare of children must be read down (see *Re L.S.H.; Ex parte R.T.F.* [1987] 164 CLR 91 at 124). The relevant legislative powers are to be found in s. 51 (xxi) (the marriage power) and s. 51 (xxii) (the divorce and matrimonial causes power). However much it may be an affront to accepted principles of construction, the course of decisions in this Court has, I think, led to the result that there is now nothing contained in the divorce and matrimonial causes power which is not contained in the marriage power, I am, therefore, able to confine myself to the marriage power, which is a power to make laws with respect to marriage.

There should be no need to point out that that power is not a power to make laws with respect to children, the welfare of children, or even the welfare of children of a marriage. But that is something which tends to be forgotten due to the wide terms in which the Family Law Act is cast.

a A law is not a law with respect to marriage simply because it deals with the welfare of a child of a marriage. As Gibbs CJ said in *Fountain v. Alexander* ([1982] 150 CLR 615 at 627; see also *Marion's* case [1992] 175 CLR at 261):

> The power of the Parliament to make laws with respect to marriage does not extend to laws for the protection or welfare of the children of a marriage except in so far as the occasion for their protection or welfare arises out of, or is sufficiently connected with, the
b marriage relationship.

In deciding whether a law dealing with the welfare of the children of a marriage has a sufficient connection with the marriage relationship it is important to bear in mind that the marriage relationship, including the responsibility of caring for children arising from that relationship, does not exist in a vacuum. Married persons and their children
c live their living within a framework of laws, both State and federal, which govern their behaviour and may touch upon their welfare, but which are not connected with marriage.

This was recognized in *Reg. v. Lambert; Ex Parte Plummer* ([1980] 146 CLR 447 at 461 per Stephen J; see also *ibid.* at 451, 457, 468, 474-475, 491; *Gazzo v. Comptroller of Stamps (Vict.)* [1981] 149 CLR 227 at 238-239, 244, 272):

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> In our federation, the Commonwealth has some legislative power, concurrently with the States, with respect to the custody of infants. At the same time the States possess and exercise wide powers to legislative for the welfare of children, including the manner of their upbringing. From this distribution of legislative powers collisions between State and Federal laws may result, but the occasion for them will be much reduced if custody is recognized for what it is: the right of the guardian to make and carry out such choices
e concerning a child's upbringing as, in the case of any particular child, the current state of the general law, whether State or Federal, permits. State laws which only operate to restrict the choices open to guardians regarding children's upbringing, being laws which apply generally to all members of the community or to all children in the community, can then be seen to provide no occasion for collision. There will then, for example, be no question of conflict between State educational or criminal laws and a federal law under which custody is given to a particular parent: State laws which prevent that parent from
f keeping his child at home, untaught, or from being sent to a reformatory, will then not be seen to conflict with the parent's federally conferred custody.

The prohibition imposed by the Guardianship Act against the sterilization of a person who is incapable of consenting, where that treatment is necessary neither to save that person's life nor to prevent serious damage to that person's health, is a prohibition of
g general application in New South Wales. It is not confined to children, let alone children of a marriage. Nor is it a prohibition which can be lifted by consent, whether it be the consent of the parents of a child of a marriage or otherwise. The question is whether the Commonwealth has conferred, or could confer, upon the Family Court a welfare jurisdiction to remove the prohibition by giving its authorization or consent.

A jurisdiction such as that conferred upon the Family Court to make orders for the
h welfare of a child of a marriage is a jurisdiction which must be exercised in accordance with existing law, both State and Federal. The Family Court is not a legislative body and its orders cannot have the force of legislation: the exercise of judicial power is not the exercise of legislative power. The Family Court is not in the position of a body such as the Australian Industrial Relations Commission which exercises arbitral rather than judicial power and whose awards are given legislative force (see Industrial Relations Act
i 1988 (Cth), s. 152). If an order of the Family Court is inconsistent with an existing, valid

State law, it does not constitute an inconsistent Commonwealth law which, under s. 109 of the Constitution, prevails to the extent of the inconsistency. The Family Court order is simply contrary to law and invalid (*Marion's* case [1992] 175 CLR at 286-287 per Brennan J.). Of course, by reason of s. 109 of the Constitution, a State law cannot confer a jurisdiction which is inconsistent with the existence of a jurisdiction which is inconsistent with the Family Law Act (see *Felton v. Mulligan* [1971] 124 CLR 367 at 372, 394, 412-413; and cf. Cowen and Zines, **Federal Jurisdiction in Australia,** 2nd Edn., [1978] at 224-228). Nor can a State jurisdiction of the Family Court (see *Victoria v. The Commonwealth ("the Kakariki")* [1937] 58 CLR 618). But that is not this case, where the order sought from the Family Court would be inconsistent with the prohibition imposed by the New South Wales Act.

Furthermore, the jurisdiction conferred upon the Family Court to make an order with respect to the welfare of a child is confined by the requirement that the occasion for the exercise of the jurisdiction must be sufficiently connected with the marriage relationship to bring the jurisdiction within constitutional power.

If a State law establishes a regime which applies generally, without regard to any marriage relationship, the Family Court cannot exercise its welfare jurisdiction inconsistently with that regime. The law of general application severs the connection between its subject-matter and the marriage relationship (*Reg. v. Lambert; Ex parte Plummer* [1980] 146 CLR at 490). So, for example the Family Court cannot make a custody order inconsistent with a State law for the imprisonment of juvenile offenders. The State law operates generally, irrespective of the marriage relationship. Its subject-matter, the treatment of juvenile offenders, is not connected with the marriage relationship. A Commonwealth law freeing a juvenile offender would not be a law with respect to marriage and a Family Court order purporting to do so would likewise be invalid (*ibid.* at 451, 457, 460-461, 468, 474-475, 491).

In this case a State law of general application establishes a regime under which decisions about dental or medical treatment of persons incapable of consenting to the treatment are made irrespective of any marriage relationship. The Family Court therefore cannot make an order in the exercise of its welfare jurisdiction which would be inconsistent with that regime. The State regime has severed the connection between consent to dental and medical operations and marriage. Dental and medical operations on incompetent patients are now dealt with by a State law of general application made in the exercise of legislative power which the State Parliament has but the Commonwealth Parliament does not.

The Commonwealth Parliament does have power to make laws with respect to marriage and thus for the welfare of children of a marriage where that aspect of their welfare which is dealt with is sufficiently connected with the marriage relationship. The Parliament may confer upon the Family Court jurisdiction to make orders with respect to the welfare of children of a marriage only to that extent. It is in this way that a jurisdiction akin to a *parens patriae* jurisdiction has been conferred upon the Family Court. But the general words of Pt VII of the Family Law Act must be read down to bring them within constitutional limits. When read down, there is no inconsistency between Pt VII and the Guardianship Act. The jurisdiction of the Family Court with respect to the welfare of a child of a marriage does not extend to those matters placed under the regime established by the Guardianship Act.

Because the Family Court must exercise its welfare jurisdiction consistently with the law, that jurisdiction has been likened to the traditional *parens patriae* jurisdiction of a Court of equity. The latter jurisdiction is exercised for the benefit or welfare of a child, but the Court does not exercise its jurisdiction, indeed cannot do so, save in accordance with any applicable law. If a statute clearly gives to an authority, other than the Court, responsibility for a matter otherwise within the *parens patriae* jurisdiction, then the Court's jurisdiction is to that extent restricted (see *In re A.B. (an Infant)* [1954] 2 QB 385; *In re M. (An Infant)* [1961] Ch 328; *A v. Liverpool City Council* [1982] AC 363; *In re W. [1985] AC 791; In re M. and H. (Minors)* [1990] 1 AC 686; *In re J.S. (A Minor)* [1990] Fam 182; *In re R. (Wardship: Criminal Proceedings)* [1991] Fam 56 at 66).

In *Marion's* case there was no legislation of the Northern Territory regulating the sterilization of a child in *Marion's* situation. The matter was not the subject of Northern Territory legislation. Responsibility for the child in that regard remained with the partners to the marriage of which she was a product. Lawful authority for what would otherwise have been unlawful assault was contemplated by the Northern Territory Criminal Code. In those circumstances the jurisdiction of the Family Court was held to extend to the giving of the necessary authority. There was a connection in those circumstances between the authorization of the treatment and the marriage relationship. It is impossible to discern a similar connection in the present circumstances where the relevant responsibility has been removed by law from the parents of the incapable person.

For these reasons I would answer no to the first question in the case stated. It is unnecessary to answer the other questions.

McHugh J:

The facts, statutory provisions and questions in the case stated are set out in the judgement of Mason CJ, Deane, Toohey, and Gaurdon JJ.

The decision of this Court in *Secretary, Department of Health and Community Services v. J.W.B.* (*Marion's* case) ([1992] 175 CLR 218 at 256, 294, 318) establishes that s. 64 of the Family Law Act 1975 (Cth) ("the Act"), which is contained in Pt VII of the that Act under the heading "Children", confers a jurisdiction on the Family Court that is similar to the *parens patriae* jurisdiction exercised by the Supreme Courts of the States. Section 64 relevantly provides that in "proceedings in relation to the ... guardianship or welfare of ... a child ... the Court may make such order in respect of those matters as it considers proper". *Marion's* Case also established that the powers conferred by that jurisdiction extend to the making of an order that authorises the sterilization of a child of marriage. For all legal purposes, that authority is as effective as a consent given by a person of full age and capacity in respect of interferences with that person's own body. Because the jurisdiction is conferred to enhance the welfare of the child, it necessarily follows that the Family Court also has power to specify which medical practitioner or practitioners may perform the sterilisation procedure. However, the central issue raised by the case stated is whether or not an order made under the Act authorising a person to carry out the procedure also authorises that person to carry at the procedure without complying with the provisions of s. 35 of the Guardianship Act 1987 (NSW).

The jurisdiction conferred on the Family Court by Pt VII of the Act is exclusive of the jurisdiction of the Courts of the States. Section 63A of the Act provides that: "Proceedings that may be instituted under this Part shall not ... be instituted otherwise

than under this Part." The term "Proceedings" is defined in s. 4 of the Act to mean "a proceeding in a court". Although the Act contains exceptions to this grant of exclusive jurisdiction, none is relevant here. Section 6A, therefore, evinces a legislative intention that, subject to the defined exceptions, no State law can confer jurisdiction on a State Court in matters concerning the welfare of a child of a marriage. To the extent that a State law purports to confer jurisdiction in such matters, it is invalid (constitution, s. 109). The result is that, whether or not proceedings in relation to the welfare of a child of a marriage have been instituted in the Family Court, the Courts of the States have no jurisdiction to hear such matters unless the matter comes within the defined exceptions to the exclusive jurisdiction of the Family Court. Consequently, s. 35 of the Guardianship Act is invalid in so far as it purports to confer jurisdiction on the Supreme Court of New South Wales to authorise the carrying out of a sterilisation procedure on a child of a marriage (*Ex parte McLean* [1930] 43 CLR 472 at 485-486; *Ansett Transport Industries (Operations) Pty. Ltd. v. Wardley* [1980] 142 CLR 237 at 260; *Commercial Radio Coffs Harbour v,. Fuller* [1986] 161 CLR 47 at 56).

However, because the term "proceedings" is defined to mean Court proceedings, it is impossible to construe either s. 64 or Pt VII of the Act as intending to prevent a State tribunal or authority that is not a Court from determining matters in respect of the welfare of a child. Such a conclusion could be reached only if s. 64 or Pt VII could be interpreted as meaning that only the Family Court had jurisdiction to determine matters in respect of the welfare of a child or a marriage. The existence of jurisdiction in the Family Court to hear and determine an application for consent to the sterilisation of a child of a marriage is not by itself sufficient to deprive the Guardianship Board ("the Board") of jurisdiction to hear such an application. In *Victoria v. The Commonwealth ("the Kakariki")* [1937] 58 CLR 618), the Court held a State Act valid although both it and a federal Act gave authority to remove the same wrecked vessel from waters within the jurisdiction of the State. Latham CJ said *(ibid.* at 626):

> The alleged inconsistency will exist only if the Commonwealth section is interpreted as meaning not only that the Minister can, but also that no one else can, remove the wreck. I see no reason for adopting such an interpretation of the section. The Commonwealth section simply confers a power upon the Minister. It certainly does not say in express terms that no one else shall have a similar power. There is, in my opinion, nothing in the subject matter which makes it necessary to imply a provision to that effect. There is no inconsistency in two persons or several persons having power to remove the same wreck.

Accordingly, unless proceedings before the Board can be characterised as proceedings in a Court, nothing in s. 109 of the Constitution prevents the institution of proceedings before the Board for consent to the carrying out of a sterilisation procedure on a child of a marriage.

Although the Board exercises jurisdiction in respect of matters that are within the jurisdiction of the Family Court and the Supreme Court of New South Wales and has some of the trappings of a Court, it is an administrative body and not a Court. The Board is to consist of at least 10 members (Guardianship Act, s. 49(2)). At least three of them are to be legal practitioners (s. 49(3)(a)). At least three of them are to be persons who have experience in assessing or treating persons to whom Pt 3, 4 or 5 of the Guardianship Act relates (s. 49(3)(b)). At least four persons are to be persons, not falling within these two categories, who "have had experience with persons to whom Pt 3, 4 or 5 relates" (s. 49(3)(c)). For the purpose of exercising its functions, the Board is to be constituted by

no fewer than three and no more than five of its members (s. 51(1)). When it exercises its function the Board must contain at least one member from each of the three categories (s. 51(1)). In the conduct of its proceedings, the Board is not bound by the rules of evidence "but may inform itself on any matter in such manner as it thinks fit" (s. 55(1)). The proceedings are to be conducted "with as little formality and legal technicality and form" (s. 55(2)) as is possible. The Board is not to make a decision in respect of an application until it has used its best endeavours to bring the parties to settlement (s. 66). The Board may, on its own motion, review any guardianship order (s. 25(1)).

The foregoing matters point strongly to the Board being an administrative body and strongly against it being a Court (*Attorney-General v. British Broadcasting Corporation* [1981] AC 326 HL). Furthermore, the nature of the proceedings under Pt 5 of the Guardianship Act point irresistibly to the conclusion that the Board is not a Court when it determines an application under that Part. In making a determination under that Part, the Board is not declaring any pre-existing rights of the parties in litigation before it. Its duty is to refuse to consent to the carrying out of treatment unless it is satisfied "that the treatment is the most appropriate form of treatment for promoting and maintaining the patient's health and well-being" (s. 45).

Certainly, some of the powers and procedures of the Board resemble those of the established Courts. Thus, a person may be represented before the Board by a barrister or solicitor (s. 58(1)). A party to proceedings may call and examine any witness, cross-examine any witness called by another party, give evidence on oath, produce documents and exhibits to the Board, and "adduce, orally or in writing, to the Board such matters, and address the Board on such matters, as are relevant to the proceedings" (s. 59). The Board may compel any person to appear before it to give evidence or to produce any document that is relevant (s. 60). The member presiding at a sitting of the Board is to "cause a record to be kept of any decision" (s. 71). The reasons for the Board's decision with respect to proceedings before it must be set out in writing and signed by the presiding member (s. 68). A party to proceedings before the Board may appeal to the Supreme Court from any decision of the Board. The appeal is as of right on a question of law and , by leave of that Court, on any other question (s. 67). When these matters are weighed against the matters that tell against the Board being a Court, however, they are insufficient to lead to the conclusion that the Board is a Court when it exercises jurisdiction under Pt 5 of the Guardianship Act.

Accordingly, the present case must be approached on the basis that the Board as well as the Family Court has jurisdiction to hear and determine an application of the kind involved in this case.

Although the Board retains jurisdiction to deal with matters related to the welfare of a child of a marriage, the Board has no power to make a determination that would prevent, or frustrate or interfere with an order of the Family Court. If a law of the State authorises a State tribunal to make an order which impairs or detracts from the operation of an order of a Court that is authorised by federal law, the State law is inconsistent with the federal law for the purpose of s. 109 of the Constitution. The inconsistency is between the federal law and the State law and not the order of the federal Court and the State law (see *T.A. Robinson & Sons Pty. Ltd. v. Haylor* [1957] 97 CLR 177 at 182; *Metal Trades Industry Association v. Amalgamated Metal Workers' and Shipwrights' Union* [1983] 152 CLR 632 at 641-642, 648). In the absence of a contrary indication in the federal law, Parliament should be taken to have intended that the exercise of an authority

conferred by that law should be exclusive of the laws of the States (see *Stock Motor Ploughs Ltd. v. Forsyth* [1932] 48 CLR 128 at 136; *Victoria v. The Commonwealth* [1937] 58 CLR at 631; *Carter v. Egg and Egg Pulp Marketing Board (Vict.)* [1942] 66 CLR 557 at 574-576; *Reg. v. Winneke; Ex parte Gallagher* [1982] 152 CLR 211 at 217, 221, 231-232, 233).

In the present case, the conclusion is irresistible that the federal Parliament intended that, if the Family Court exercised its power to consent to the sterilisation of a child of a marriage, the exercise of that power was to be exclusive of the exercise of any similar power invested in a State tribunal or authority. It is not to be supposed that Parliament intended that a State tribunal or authority could consent to the sterilisation of a child of a marriage if the Family Court had refused to give its consent. Nor is it to be supposed that, if State law also regulates the subject matter of the order of the Family Court, federal Parliament intended that the order of the Family Court was to be inoperative until a State tribunal or authority also gave any relevant consent to the procedure. An order of the Family Court that authorises the sterilisation of a child of a marriage is intended to adjust the legal relationship that exists between the child and all those persons affected by the operation of the order. The order of the Family Court is intended to make lawful conduct that at common law would otherwise be a crime against the State and a civil wrong to the child. In the absence of an indication to the contrary, it is not to be supposed that Parliament intended that the orders of the Family Court were made subject to the operation of the laws of the six States. If a law of the State would operate so as to interfere with or vary the legal relationship established by the order of the Family Court, whether directly or through an order of a State tribunal or authority, the State law would be inconsistent with the order and, consequently, the Act (see *Metal Trades Industry Association* [1983] 152 CLR at 642-643).

Accordingly, once the Family Court makes an order under Pt VII of the Act in respect of the sterilisation of a child of a marriage, s. 109 of the Constitution operates to invalidate any State law which is inconsistent with the operation of Pt VII (*Victoria v. The Commonwealth* [1937] 58 CLR at 631). Once the order is made, s. 35 of the Guardianship Act cannot validly operate so as to frustrate or interfere with the set of legal relations established by that order. Thus, the Board has no power or authority to make an order that would alter or very the relationship between the child and other persons affected by the order. Nor can s. 35 validly interfere with the right of a person to carry out a sterilisation procedure in accordance with the authority of an order of the Family Court. Once the order is made that person is not affected by the prohibition in s. 35 of the Guardianship Act against carrying out medical treatment on a person to whom Pt 5 of the Guardianship Act applies. The Guardianship Act cannot forbid what the Act authorises or authorise what the Act forbids (*Colvin v. Bradley Brothers Pty. Ltd.* [1943] 68 CLR 151 at 160).

During the argument in this Court, much attention was paid to the question whether a federal Court could make an order authorising conduct that would otherwise be unlawful under State law. While there is much to be said for the view that a grant of jurisdiction to a federal Court or authority should not be construed as authorising that Court or authority to make an order that is inconsistent with the law of a State unless the grant does so expressly or by necessary implication, that issue does not arise in this case. In making a determination on an application such as is involved in the present case, the Family Court has no duty to consider the provisions of s. 35. Its duty is to consider all the circumstances of the case and make such order as it thinks is in the best interests

of the child. Once it has made that order, the effect of the order on State law is determined by the intention of the Act. Because the intention of the Act is that an order made under the Act is to regulate the matters with which it deals to the exclusion of State law, s. 35 cannot constitutionally prevent, frustrate or interfere with the operation of an order such as is sought from the Family Court in this case.

It was also contended that, if the Act authorised the Family Court to make an order that was inconsistent with s. 35(1) of the Guardianship Act, the Act was inconsistent with Ch. III of the Constitution. It was contended that such an authority would be executive, and not judicial, in nature. However, the Act does not purport to authorise the Family Court to suspend or override the operation of State laws such as s. 35. The Act invests the Family Court with jurisdiction to make orders for the welfare of a child of a marriage. When such an order is made, the intention of the Act is that no State law is to prevent, frustrate or interfere with the operation of the order. Section 109 of the Constitution, not the Family Court, then suspends the operation of the State law.

I agree with the answers to the case stated that are proposed by Mason CJ, Deane, Toohey and Gaudron JJ.